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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 585

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

vs.

NATIONAL BROADCASTING COMPANY, INC. (KOA),
MATHESON RADIO COMPANY, INC., AND BERKS
BROADCASTING COMPANY, INTERVENORS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED DECEMBER 12, 1942
CERTIORARI GRANTED JANUARY 18, 1943

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IN

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

NO. 7933.

NATIONAL BROADCASTING COMPANY, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

MATHESON RADIO COMPANY, INC.,
BERKS BROADCASTING CO.,
Intervenors.

Appeal from the Federal Communications Commission.

APPENDIX TO BRIEF FOR APPELLANT.

I.

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS DESIGNATED BY APPELLANT.

2 *Notice of Appeal from Decision and Order of the Federal Communications Commission and Statement of Reasons Therefor.*

I. Notice of Appeal.

Now comes National Broadcasting Company, Inc. this 7 day of June, 1941 and says that it is aggrieved and that its interests are adversely affected by decision and order of

the Federal Communications Commission dated April 7, 1941 (reaffirmed on May 20, 1941 by denying appellant's Petition for Re-hearing) granting an application for a
3 radio station license filed by Matheson Radio Company, Inc. as hereinafter more fully appears.

Wherefore, appellant gives notice of its appeal therefrom to the United States Court of Appeals for the District of Columbia.

II. Statement of the Nature of the Proceedings.

1. Appellant is a corporation organized and existing under the laws of the State of Delaware with its principal office at 30 Rockefeller Plaza, New York, N. Y. Appellant is the licensee of radio station KOA which station has been in continuous operation at Denver, Colorado since December 15, 1924. For more than twelve years prior to the reallocation of stations on March 29, 1941 pursuant to the North American Regional Broadcasting Agreement, KOA has been authorized to operate unlimited time with power of 50 kw on the frequency 830 kc. Under orders of the Federal Communications Commission (hereinafter called the "Commission") effective March 29, 1941, and in conformity with the terms and provisions of the North American Regional Broadcasting Agreement said station is now assigned to the frequency 850 kc.

2. Matheson Radio Company, Inc. (hereinafter referred to as "applicant") is the licensee of radio station WHDH at Boston, Massachusetts. Said station is now also assigned to the frequency 850 kc and prior to the decision and order complained of, was licensed to operate with power of 1 kw until sunset at Denver.

3. Continuously between November 11, 1928 and April 7, 1941 the Rules and Regulations of the Federal Radio Commission and of the Federal Communications Commission provided that the frequency of 830 kc (850 kc) upon which KOA and WHDH were licensed to operate should be classed as a clear channel upon which only one

station would be permitted to operate at night. Throughout this period KOA, being classed as the dominant clear channel station, has been authorized and permitted to operate at all times without co-channel interference at night from any other station in the United States. Since 1928 KOA has been protected from co-channel interference from any Canadian station pursuant to agreements existing between the Governments of the United States and Canada. Since March 29, 1941, (except for the action herein complained of on April 7, 1941) KOA's service and service area within the United States have also been entitled to protection from all stations in Canada, Mexico and Cuba under the provisions of the North American Regional Broadcasting Agreement.

4. Since December 18, 1935, the Rules and Regulations of the Commission have contained the following provisions now found in Section 1.72 of said Rules and Regulations:

> "Any application which is not filed in accordance with the Commission's Regulations will be considered defective. * * * Such defective applications will not be considered by the Commission, but will be returned to the applicant by the Secretary, with a brief statement of the respect in which it is defective."

5. Since August 1, 1939, Section 1.71 of the Commission's Rules and Regulations has contained the following provisions:

> "Each application for an instrument of authorization shall comply with the Commission's Rules and Regulations and shall be made in writing, subscribed and verified as provided in Section 1.121 on a form furnished by or in the manner prescribed by the Commission: * * * *Provided, further,* that in cases where an applicant desires a modification of a Rule or Regulation he shall submit a formal Petition setting forth the desired change and the reasons in support thereof. The required forms may be obtained from the Commission or from any of its field offices. (For a list of such offices and related geographical districts see appendix No. 3)."

6. The application of Matheson Radio Company, Inc., granted by the Commission on April 7, 1941, requested the use of power of 5 kw with a directional antenna during unlimited hours of operation. Said application was filed October 25, 1938. Neither the application nor any other document submitted by the applicant with said application or relating thereto requested any modification of the Commission's Rules and Regulations.

7. On January 3, 1939, and notwithstanding the procedural requirements of the Commission's Rules and Regulations and the applicant's failure to meet the same, the Commission designated the WHDH application for hearing before Commissioner Case. Its Notice of Hearing dated September 2, 1939, specified the following issues:

1. To determine whether the interests of any other stations may be adversely affected by reason of interference, particularly stations KOA, WRUF, WEEU and WABC;
2. Because of the pendency of another application with which conflict may be had by reason of interference, *i. e.;* B3-P-2408 (WRUF);
3. *To determine whether public interest, convenience or necessity would be served by modifying the Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25; (Part III), to authorize the operation of WHDH as proposed;* (Italics supplied)
4. To determine whether station WHDH, operating as proposed on 830 kc with 5 kw power would render the type of service for which said frequency is designed under the Commission's plan of allocation and Standards of Good Engineering Practice.

8. On February 23, 1939, appellant filed a Petition to Intervene in any proceedings relating to the WHDH application. In said Petition it was alleged, among other things, that the operation of WHDH as proposed would cause in-

terference to KOA in areas where KOA's signal is
6 now interference free; that appellant would be aggrieved and its interests adversely affected should WHDH be authorized to operate as proposed; and that the operation of WHDH as proposed would not be in the public interest, convenience and necessity. This Petition was denied by Commissioner Payne on October 2, 1939 and, on October 10, 1939, a Petition to Review his action, filed under Section 1.256, was also denied by the Commission.

9. On September 29, 1939, appellant filed a Motion to Dismiss the WHDH application because said application was patently in conflict with Sections 3.22 and 3.25 of the Commission's Rules and Regulations and because of the failure of the applicant to conform to the requirements of Section 1.71 of the Commission's Rules and Regulations. The relief requested by appellant was that the hearing then scheduled upon said application be cancelled and that the application be dismissed and returned to the applicant. This Motion was denied by the Commission on December 5, 1939.

10. On December 2, 1939, the Commission, on its own motion, issued a second Notice of Hearing to replace the Notice originally issued on September 2, 1939, as aforesaid, which Notice specified the following issues:

1. *To determine whether or not the Commission's Rules and Regulations Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III) properly interpreted and applied preclude the granting of the application.* (Italics supplied)
2. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with stations KOA, WRUF, WEEU and WABC;
3. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with station WRUF operating as proposed in its pending application (File B3-P-2408).

11. On January 29, 1940, a hearing was held upon the second or substituted Notice of Hearing before an Examiner of the Commission which hearing was followed on December 9, 1940, by the issuance of the Commission's "Proposed Findings of Fact and Conclusions". In said "Proposed Findings of Fact and Conclusions" three of the five members of the Commission present and participating proposed that Section 3.25 of the Commission's Rules and Regulations be amended so as to alter the status of the frequency 830 kc to permit the nighttime operation of WHDH as proposed in the pending application and also recommended that said application be granted. Two Commissioners dissented in a separate opinion released on the same day.

12. On December 16, 1940, and after being advised of the contents of the Commission's "Proposed Findings of Fact and Conclusions", appellant filed a second Petition to Intervene in which, among other things, it requested that it be permitted to:

(a) File a motion to reopen the proceedings in order to afford appellant an opportunity to introduce evidence, cross examine all witnesses and otherwise participate fully in the proceedings.

(b) Upon such record file Proposed Findings of Fact and Conclusions of Law.

(c) Have the right to file exceptions to any proposed Commission Decision thereafter issued.

(d) Request Oral Argument upon such decision and upon exceptions thereto, and

(e) In all respects participate fully in the important issues involved in the application of Matheson Radio Company, Inc.

Said Petition was denied by order of the Commission dated January 7, 1941, at which time it was announced that appellant would be permitted to file a brief *amicus curiae*.

13. Thereafter on January 27, 1941, appellant filed

its Brief *amicus curiae* and, on February 20, 1941, oral argument was had before the Commission in which appellant was permitted to participate not as a party in interest but again as *amicus curiae*. On March 27, 1941, the Commission publicly announced that it had adopted the "Proposed Findings of Fact and Conclusions" made public on December 9, 1940, by a vote of three to two with two members not participating. On April 7, 1941, a formal Order to this effect was promulgated effective on the same day.

14. On April 25, 1941 and pursuant to the provisions of Section 405 of the Communications Act of 1934 appellant filed a Petition for Rehearing. On May 20, 1941 the Commission entered its Order denying appellant's Petition for Rehearing and reaffirming its decision and order of April 7, 1941.

III. Reasons Relied on by Appellant.

1. The Commission erred in failing to return the WHDH application to the applicant without action as a defective application under its Rules.
2. The Commission erred in denying the Petition to Intervene filed by appellant September 23, 1939.
3. The Commission erred in denying the Motion to Dismiss the WHDH application filed by appellant September 29, 1939.
4. The Commission erred in denying the Petition to Intervene filed by appellant December 16, 1940.
5. The Commission erred in denying the Petition for Rehearing filed by appellant April 25, 1941.
6. The Commission's Decision and Order of April 7, 1941 (reaffirmed May 20, 1941) is contrary to law for each of the following reasons:

9 (a) It results in a substantial modification of the license held by appellant authorizing it to operate radio station KOA without having afforded appellant an opportunity to be heard as required

by Section 312 (b) of the Communications Act of 1934.

(b) It results in a change in the class and character of the frequency of radio station KOA without the consent of the licensee of said station and without affording said licensee an opportunity to be heard as required by Section 303 (f) of the Communications Act of 1934.

(c) It results in a degradation of service on 830 kc (850 kc) which will be prejudicial to the priority rights of the United States on this channel under Paragraph B 8 (d) of Part II of the North American Regional Broadcasting Agreement without affording appellant an opportunity to be heard on its own behalf and on behalf of the listeners it serves.

(d) It results in a discrimination against service to rural listeners in order to furnish additional service to the residents of the City of Boston and as such is violative of the requirements of Section 307 (b) of the Communications Act of 1934.

(e) It effects a change in the policy of the Commission with respect to the use of the frequency 830 kc (850 kc) and authorizes and directs a new kind of use of said frequency after a hearing before an examiner contrary to Section 409 (a) of the Communications Act of 1934.

(f) The Commission was without power to grant the WHDH application except after a hearing upon issues clearly defined and after affording appellant an opportunity to participate fully in such hearing.

(g) The Commission was without power to take any action upon the WHDH application except to return said application to the applicant as required by its Rules and Regulations.

(h) The Commission was without power under its Notice of Hearing dated December 2, 1939, either to amend its Rules and Regulations fixing the

status of the frequency 830 kc (850 kc) or to grant the WHDH application which was clearly in conflict with said Rules and Regulations.

(i) The Commission was without power to grant the WHDH application except after a full hearing in which the burden of proof was upon the applicant to show that the granting of its application would make for a fair, efficient and equitable distribution of radio service and would in all aspects serve the public interest, convenience and necessity.

7. The Decision and Order complained of is erroneous, arbitrary and capricious, in that it constitutes an attempt by the Commission while acting in its quasi-judicial capacity to ignore and retroactively to repeal its own pronouncements promulgated while acting in its legislative capacity.

8. The Decision and Order complained of is arbitrary and capricious in that, despite applicant's express disavowal of such a purpose, it is predicated upon a proposal for a new kind of use of the frequency 830 kc (850 kc) concerning which appellant had no due and timely notice and upon which it was not heard prior to the issuance of said final Decision and Order.

11 9. The Decision and Order complained of is arbitrary and capricious in that it is predicated upon a proposal for the use of the frequency 830 kc (850 kc) advanced by the Commission subsequent to the issuance of its second Notice of Hearing which Notice clearly indicated that such a proposal would not be considered.

10. The Decision and Order complained of was made without affording appellant the type and character of hearing required by the Communications Act of 1934.

11. The Findings and Conclusions of the Commission are insufficient to support the Decision rendered and do not fairly report and represent the evidence in the record.

12. The evidence is insufficient to support the Commission's Decision and Order in that it affords no basis for a comparison of the services rendered by radio stations WHDH and KOA.
13. The evidence is insufficient to support the Commission's Decision and Order in that it fails to afford any basis for a determination of the relative scope, character and quality of the radio services available to the residents of Boston and the area adversely affected by the granting of the WHDH application.
14. The Decision and Order complained of is illegal, void and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States in that it is based upon facts and issues concerning which appellant was denied a hearing at any stage of the proceedings.

12 *IV. Review Requested.*

WHEREFORE the appellant prays an order reversing said decision and order of the Federal Communications Commission and for such further relief as to this Honorable Court may seem just and proper.

Respectfully submitted,

NATIONAL BROADCASTING COMPANY, INC.,
By D. M. PATRICK,
PHILIP J. HENNESSEY, JR.,
Its Attorneys,
810 Colorado Bldg.,
Washington, D. C.

A. L. ASHBY,
HENRY LADNER,
Of Counsel.

Acknowledgment of Service.

Service of the foregoing "Notice of Appeal From Decision and order of the Federal Communications Commission and Statement of Reasons therefor" and receipt of a full, true and correct copy is hereby acknowledged this 7 day of June, 1941.

FEDERAL COMMUNICATION COMMISSION,
By T. J. SLOWIE,

68 Endorsed: Docket File Copy Original

Federal Communications Commission

Washington, D. C.

File No. B1-P-2201
Docket No. 5453

Notice

In re Application of Matheson Radio Company Inc. (WHDH)

Dated July 27, 1939
For Construction Permit
Class of Service Broadcast
Class of Station Broadcast
Location Saugas, Mass.; Trans. Boston, Mass.; Studio

Operating Assignment Specified Frequency 830 kc directional antenna night Power 5 kw night; 5 kw day Hours of operation Unlimited

The foregoing application has been designated for hearing at the office of the Commission, Washington D. C. on the 10th day of October, 1939.

1. To determine whether the interests of any other stations may be adversely affected by reason of interference, particularly Stations KOA, WRUF, WEEU and WABC;

2. Because of the pendency of another application with

which conflict may be had by reason of interference, i. e. (B3-P-2408) WRUF;

3. To determine whether public interest, convenience or necessity would be served by modifying the Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part 3), to authorize the operation of WHDH as proposed;

4. To determine whether Station WHDH, operating as proposed on 830 kc with 5 kw power would render the type of service for which said frequency is designated under the Commission's plan of allocation and Standards of Good Engineering Practice.

The application involved herein will not be granted by the Commission unless the issues listed above are determined in favor of the applicant on the basis of a record duly and properly made by means of a formal hearing.

69 The applicant is hereby given the opportunity to obtain a hearing on such issues by filing a written appearance in accordance with the provisions of Section 1.382(b) of the Commission's Rules of Practice and Procedure. Persons other than the applicant who desire to be heard must file a petition to intervene in accordance with the provisions of Section 1.102 of the Commission's Rules of Practice and Procedure.

The applicant's address is as follows:

Matheson Radio Co. Inc.
Radio Station WHDH,
Hotel Touraine, 62 Boylston St.,
Boston, Mass.

Dated at Washington, D. C. September 2, 1939.

By the Commission

T. J. SLOWIE,
Secretary.

88 *Petition to Intervene*

National Broadcasting Company, Inc., files this Petition to Intervene in the above entitled matter. In support thereof it asserts:

1. Petitioner operates station KOA at Denver, Colorado on 830 kc with power of 50 kw unlimited time.

2. The operation of station WHDH at Boston, Mass., as proposed will cause interference to station KOA in areas where KOA's signal is now interference free.

3. Petitioner would be aggrieved and its interests adversely affected should WHDH be authorized to operate as proposed.

4. The operation of WHDH as proposed would not be in the public interest, convenience and necessity.

Respectfully submitted,
NATIONAL BROADCASTING COMPANY, INC.

A. L. ASHBY
PHILIP J. HENNESSEY, JR.
HENRY LADNER
JOHN J. HURLEY
Its Attorneys
201 Normandy Building
Washington, D. C.
By PHILIP J. HENNESSEY, JR.

Dated this 23rd day of September 1939.

* * * * * * * * * * *

102 *Order*

Upon consideration of a Petition to intervene filed herein on September 23, 1939, by National Broadcasting Company, Inc.,

It is ordered, on this the 29th day of September, 1939, that the Petition be, and the same is, hereby, denied.

See decision entered this day in Docket No. 5698 on

Petition of Orlando Broadcasting Company, Inc.
By order of George Henry Payne, Commissioner.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,

Secretary.

103 *Decision on Petition to Intervene and Request for Enlargement of the Issues.*

Payne, Commissioner (Presiding at Motions Docket)

This petition was filed by the Orlando Broadcasting Company, Inc., licensee of Radio Station WDBO, Orlando, Florida, and requests leave to intervene in the hearing designated by the Commission on the above-entitled application and further requests that the issues heretofore designated by the Commission to be heard at said hearing be enlarged to include the following: (a) to determine the extent of the broadcast service already rendered in the Orlando area; (b) to determine if the interests of Station WDBO will be adversely affected by a grant of the above-entitled application; and (c) to determine whether the operations of the station proposed by the applicant will be in accord with the Commission's plan of allocation and standards of good engineering practice.

Petitioner requests that it be made a party in the proceedings on the application of Hazelwood, Inc. and that it be allowed to present evidence on the issues listed in the Notice of Hearing heretofore published by the Commission as well as upon the additional issues requested to be added and any further issues which may be added hereafter.

When the application of Hazelwood, Inc. was received by the Commission it was examined as required by Section 309(a) of the Act, and because the Commission was unable upon such examination to reach the decision that the public interest, convenience and necessity would be served by a grant of the application it was designated for hearing in order to afford the applicant an opportunity to be heard

on the question of whether or not the application should be granted. The only issue specified by the Commission in the Notice of Hearing was that relating to the possibility of adverse effect upon the service rendered by Stations KLRA, WHK and WMFJ by reason of electrical interference which might result from the operation of the proposed new station.

104* The instant petition to intervene and to enlarge the issues to include questions other than those specified in the Notice of Hearing requires an interpretation of the Commission's rule 1.102 which became effective on August 1, 1939. Because the questions raised by the instant petition are also involved in a number of other petitions now pending on the motions docket, I feel that it is appropriate to express in some detail my views concerning the sufficiency of the instant petition in the light of the Commission's present rule governing intervention and enlargement of issues.

The Commission's rule relating to intervention and enlargement of issues, reads as follows:

"Sec. 1.102 Intervention. Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest and must be subscribed or verified in accordance with Sec. 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same."

In applying this rule to the instant petition I will deal with the request to intervene, and the request to enlarge issues separately.

Petitioner's Request to Intervene

The underlying purpose of the Commission in adopting its present rule on intervention was to correct a practice which had become prevalent under the prior rule of the Commission relating to intervention. Under its former rule, the Commission permitted any person to intervene in a hearing if his petition disclosed "a substantial interest in the subject matter." This standard was so broad and the Commission's practice under it was so loose that intervention in Commission hearings came to be almost a matter lying in the exclusive discretion of persons seeking to become parties to Commission proceedings. The experience of the Commission during the past few years clearly demonstrated that the participation of parties other than the applicant in broadcast proceedings in a great many cases resulted in unnecessarily long delays and expense to both the Commission and applicants without any compensating public benefit. In many cases the major function served by intervenors was to impede the progress of the hearing, increase the size of the record, confuse the issues and pile up costs to the applicant and to the Commission through the introduction of cumulative evidence, unnecessary cross-examination, dilatory motions, requests for oral argument and other devices designed to prevent expeditious disposal of Commission business.

105 The underlying purpose of the present rule is to limit participation in proceedings, particularly on broadcast applications, to those persons whose participation will be of assistance to the Commission in carrying out its statutory functions. The present rule requires a petitioner to set forth not only his interest in the proceeding but also "the facts on which the petitioner bases his claim that his intervention will be in the public interest". The fact that a proposed intervener may have the right to contest in a court the validity of an order granting or denying a particular application does not in and of itself mean that such person is entitled as a matter of right to be made

a party to the proceedings before the Commission on such application. Intervention in proceedings before administrative agencies like the Federal Communications Commission is ordinarily covered by statutory provision. The Communications Act contains no provisions giving the right of intervention in proceedings before the Commission to any person or class of persons, but expressly provides that the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. By the adoption of Rule 1.102 the Commission in effect has declared that it will conduce to the proper dispatch of business and to the ends of justice if it permits intervention in a proceeding before it only if the making of a record in which the facts are fully and completely developed, is facilitated by permitting the requested intervention. It is this theory—that where the public will benefit through aid or assistance given to the Commission or the applicant by a party-intervenor in a broadcast hearing, such participation should be permitted—which underlies Rule 1.102.

The petition of the Orlando Broadcasting Company, Inc., utterly fails to meet the requirement of the present rule on intervention. In so far as it requests permission to participate in the hearing already designated on the application of Hazelwood, Inc., it simply prays that the petitioner be made a party and be allowed to present "evidence". Not the slightest intimation is given as to the type of evidence which the petitioner desires to adduce or what petitioner intends to prove by the introduction of such evidence. The only issue mentioned in the Commission's Notice of Hearing is the issue of electrical interference to Stations KLRA, WHK and WMFJ, which are now operating either on 1390 kc (the frequency requested by Hazelwood, Inc.) or on adjacent frequency. The petitioner operates its station on 580 kc, so there could be no electrical interference to petitioner's station, and while it would not be impossible for the petitioner to obtain data on the issue

specified in the Commission's Notice of Hearing, it is not likely that the petitioner is as well informed or is as well-equipped to adduce testimony concerning the issue of electrical interference as is the Commission itself. Without a proper showing of the type of evidence proposed to be adduced and the facts expected to be proved thereby, the Commission would not be justified in permitting the petitioner to intervene in the proceedings on the application of the Hazelwood, Incorporated.

106 On the basis of the allegations now set forth in the instant petition the request for intervention must be denied in so far as it requests permission to participate in the hearing on the issue already designated. In so far as the petition requests permission to adduce evidence pertaining to the issues which it requests the Commission to add to the Notice of Hearing, it is necessarily contingent upon the action which is taken on the request to enlarge issues. For reasons stated below, this request must also be denied. Hence, the request to intervene in order to adduce evidence relating to these issues must be denied not only for the reasons above stated but also because the request to enlarge issues is denied.

Petitioner's Request to Enlarge Issues

The determination of what issues an applicant for broadcast facilities should be required to meet in a hearing on his application is a matter committed by Congress to the discretion of the Commission. No hearing whatever is required if the Commission is able upon an examination of an application to determine that the public interest, convenience and necessity will be served by granting the application. If the Commission is not able to reach such a determination upon the examination of an application the statute requires that notice and an opportunity to be heard shall be given the applicant, but not otherwise.

Good administration, both from the theoretical and practical standpoint, requires that unduly long and expensive

hearings should be avoided. Therefore, the Commission should not burden itself or the applicant by the injection in a hearing of issues concerning which the Commission has already satisfied itself. Furthermore, if in a particular case it appears that a hearing on a particular issue would be expensive and time-consuming, while a hearing on another issue, which might finally dispose of the application, would be relatively inexpensive and expeditious, the Commission as a matter of administrative convenience should set down the application for hearing only on the latter issue.

In the instant case the Commission was unable to find that the public interest, convenience and necessity would be served by granting the application of Hazelwood, Inc., because of the possibility of interference with the service now rendered by three other stations. If at the hearing on its application the applicant is unable to sustain the burden with respect to this issue, the Commission will enter an order denying the application, which will completely dispose of the proceedings. In such event, it would have been wholly unnecessary and wasteful of both time and money for the Commission to have ordered a hearing not only upon the issue of electrical interference but also upon other issues which might also have constituted a basis for denying the application.

107 It is incumbent upon any person requesting the injection of new issues in a hearing to show not only that the issues which he proposes to have the Commission add are proper matters for the Commission to consider, and that there is a basis for believing that the Commission will be required to deny the application on the new grounds alleged, but also that the proposed new issues should be heard at the hearing already set rather than at a later time. Certainly, if the issues specified by the Commission in a Notice of Hearing are in themselves a sufficient basis for denying an application if the applicant fails to sustain its burden of proof, no third person is harmed because the Commission does not also include in the hearing other and

different issues, even though conceivably it may be necessary at some later time for the Commission to designate the application for further hearing if the applicant meets its burden on the issues already specified. The instant petition to enlarge issues merely states that the three issues requested for inclusion in the hearing are proper issues for the Commission to consider before acting upon the application of Hazelwood, Inc. Assuming for the purpose of this opinion but not conceding, that the three issues proposed to be included in the hearing are proper for the Commission to consider, petitioner has utterly failed to show that the insertion of these additional three issues in the hearing at this time on the application of Hazelwood, Inporated, would expedite the disposition of this application and not merely result in a more costly, drawn out and complicated record, with no attendant advantages to the Commission or to the public.

For the foregoing reasons, the petition to enlarge issues is denied.

By order of George Henry Payne, Commissioner.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

Dated September 29th, 1939.

* * * * * * * * * * *

124 *Motion to Dismiss Application*

National Broadcasting Company, Inc., an intervener in the above entitled matter moves to dismiss the above entitled application of Matheson Radio Company, Inc.

In support of its Motion this intervener avers:

1. The application upon its face requests unlimited hours of operation—see application upon FCC form 304 for Modification of Station License; application upon FCC form 301 attached thereto as exhibit A; see also Commission's Notice of Hearing.

2. At the time said application was filed it was, it is now, and at all intervening times has been, an application for

hours of operation for which station WHDH was and is ineligible under the Commission's Rules and Regulations; to-wit: Under Rule 116 prior to August 1, 1939 and under Paragraphs 3.22 and 3.25 (a) since August 1, 1939.

3. At the time said application was filed, at the present time, and at all times intervening, the Rules and Regulations of the Commission have provided that such applications will not be considered by the Commission but will be returned to the applicant by the Secretary with a brief statement of the respect in which such application is defective—to wit: Prior to January 1, 1939 under Rule 104.1; between January 1, 1939 and July 31, 1939 under section 4.02 of the Commission's Rules of Practice and Procedure; since August 1, 1939 under Paragraph 1.72 of the Commission's Rules of Practice and Procedure.

125 Wherefore, this intervener moves that the hearing now scheduled to be held upon the aforementioned application on October 10, 1939 be cancelled; and that the application be dismissed and returned to the applicant.

Respectfully submitted,

NATIONAL BROADCASTING COMPANY, INC.

A. L. ASHBY
PHILIP J. HENNESSEY, JR.
HENRY LADNER
JOHN HURLEY

By PHILIP J. HENNESSEY, JR.

Dated this 29th day of September 1939

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127 *Petition for Review Under Section 1.256*

On this Fourth day of October, 1939 National Broadcasting Company, Inc., (KOA,) files this Petition under Section 1.256 of the Rules and Regulations of the Federal Communications Commission for:

(a) A review and reversal by a quorum of the Commission of the Order of Commissioner George Henry Payne, bearing the date of September 29, 1939, denying a Petition to Intervene in the above-entitled matter filed on September 23, 1939 by National Broadcasting Company, Inc., and

(b) For other appropriate relief more fully described hereinafter.

Petitioner asserts that its action in filing this Petition is timely notwithstanding the lapse of more than two days between the date of September 29, 1939 which appears upon the face of the Order and the date upon which this Petition is filed for the following reasons:

1. On Friday, September 29, 1939, after hearing argument upon said Petition to Intervene, Commissioner Payne advised the undersigned Counsel for Petitioner that he would reserve decision upon the Petition until Monday, October 2, 1939.

2. On Monday, October 2, 1939 at about 1 P. M. the undersigned Counsel for Petitioner (who was then in Boston,
Massachusetts participating in the taking of depo-
128 sitions by the Applicant) was first advised by Counsel for the Applicant that the Petition to Intervene had been denied and Counsel forthwith returned to Washington, D. C.

3. A copy of the Order bearing the date of September 29, 1939 and bearing the seal of the Commission and the signature of its Secretary was first received at the offices of the Counsel for the Petitioner on October 4, 1939, at 9 A. M.

Specifications of Error

The Order complained of was not the subject of any decision or opinion. However, it refers to, and appears to be based upon, findings similar to those set forth in a decision also bearing the date of September 29, 1939 in Docket 5698 upon a Petition of Orlando Broadcasting Company, Inc. This Petitioner alleges that the Order complained of is erroneous as a matter of law in the following particulars:

1. If the Order is based upon findings that the Petition to Intervene filed on behalf of National Broadcasting Company, Inc. on September 23, 1939 is defective for failure to allege the position and interest of Petitioner in the proceeding and the facts upon which Petitioner bases its claim that its intervention would be in the public interest, then such findings are erroneous.

2. If the Order is based upon findings that Section 1.102 may properly require, and does require, allegations of fact over and above those set forth in the Petition of September 23, 1939, then such findings are erroneous and such additional requirements of Section 1.102 are void, contrary to law, beyond the authority of the Commission to adopt, and in violation of the Fifth Amendment to the Constitution of the United States.

129 3. Because of the failure of Commissioner Payne to find that Petitioner's Petition to Intervene contains all the necessary averments to support its intervention; his failure to find that Petitioner is entitled as a matter of right to participate fully in the proceedings in Docket 5453; and his failure to grant said Petition.

4. Because the Order complained of is unreasonable, arbitrary, and capricious.

Prayer for Relief

Petitioner prays:

1. That it be afforded an opportunity to present oral argument before a quorum of the Commission and briefs

2. That the Commission review and reverse the Order complained of

3. That an Order be entered permitting Petitioner to participate fully in the proceedings in Docket 5453.

4. That the hearing now scheduled to be held in Docket 5453 on October 10, 1939 be postponed until a date not less than 10 days after Commission Action upon this Petition.

Respectfully submitted,

A. L. ASHBY
PHILIP J. HENNESSEY, JR.
HENRY LADNER
JOHN J. HURLEY
Attorneys National Broadcasting Co., Inc., (KOA,)
201 Normandy Building
Washington, D. C.

By PHILIP J. HENNESSEY, JR.

Dated October 4th, 1939.

* * * * * * * * * * *

146 *Order*

Upon consideration on the merits of the Exceptions to Decision of Commissioner Payne, Presiding at Motions Docket, Petition for Review under Section 1.256 filed herein on October 4, 1939, by National Broadcasting Co., Inc., licensee of Station KOA, requesting review of the action by Commissioner Payne of September 29, 1939, denying Petition to Intervene therttofore filed by said station,

It is Ordered, That the action of Commissioner Payne Be Affirmed, That the Petition for Review Be Denied, That the exception of the petitioner to the action of Commissioner Payne Be Noted, and That the Opposition by the applicant to said Petition for Review Be Dismissed.

Dated October 10, 1939.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

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163 *Order*

At a regular meeting of the Commission held at its office in Washington, D. C., on the 20th day of November, 1939.

The Commission having under consideration the order heretofore entered, designating Commissioner Case to preside at the hearing in Docket No. 5453, and being fully advised in the premises:

It Is Ordered, that said Commissioner so designated to preside at the hearing in the above Docket Be, And He Is Hereby authorized and empowered to fix the time and place such hearing shall be held, to hear, consider, determine and act upon any and all petitions, motions, and other preliminary matters in connection wth, or pertaining to, said proceeding which may arise prior to the date of said hearing.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE,
Secretary.

164 File No. B1-P-2201

Docket No. 5453

Notice

In Re Application Of Matheson Radio Company Inc.
(WHDH)
Dated July 27, 1938
For Construction Permit
Class of Service Broadcast
Class of Station Broadcast
Location Saugas, Mass.; Trans. Boston, Mass.; Studio
Operating Assignment Specified
Frequency 830 kc directional antenna night
Power 5 kw night; 5 kw day
Hours of operation Unlimited

The proposed issues on which the above-entitled application will be heard on December 11, 1939, at the offices of the Commission, Washington, D. C., are as follows:

1. To determine whether or not the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III) properly interpreted and applied preclude the granting of the application;

2. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with stations KOA, WRUF, WEEU and WABC;

3. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with Station WRUF operating as proposed in its pending application (File No. B3-P-2408).

Dated at Washington, D. C., December 2, 1939.

BY THE COMMISSION,
T. J. SLOWIE,
Secretary.

166 *Order*

The Commission, on November 20, 1939, having designated that Commissioner Case be authorized and empowered to hear, consider, determine and act upon any and all Petitions, Motions or other preliminary matters in connection with or pertaining to the above styled proceeding which may arise prior to date of said hearing; and

It appearing that the Commission, on December 2, 1939, amended the issues and reissued a notice of hearing in the above styled proceeding; and

It appearing that there are pending a Petition and Supplemental Petition to Intervene filed by the licensees of thirteen broadcast stations, Station KFI and others referred to therein as the "Clear Channel Group", the Motion to Dismiss the application or eliminate Issue No. 3 filed by such Group, the Motion to Dismiss application filed by the National Broadcasting Company, Inc. (KOA), and the op-

position to such Motions to Dismiss filed by the applicant, and being fully advised in the premises;

It Is Ordered that the Petition and Supplemental Petition to Intervene of the licensees of thirteen broadcast stations, Station KFI and others referred to therein as the "Clear Channel Group", the Motion to Dismiss the application or eliminate Issue No. 3 filed by such Group, the Motion to Dismiss application filed by the National Broadcasting Company, Inc. (Station KOA), and the opposition to such Motions to Dismiss filed by the applicant Be, And The Same Are Hereby dismissed without prejudice.

By Order of Norman S. Case, Commissioner, this the 5th day of December, 1939.

FEDERAL COMMUNICATIONS COMMISSION
JOHN B. REYNOLDS,
Acting Secretary.

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395 *Order*

It Is Ordered That Mr. R. H. Hyde, Be, And He Is Hereby, assigned as an examiner to preside at the hearing in the above entitled matter, scheduled for Monday, January 29, 1940.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE,
Secretary.

• • • • • • • • • • •

517 *Findings of Fact*

1. These proceedings arose upon the application of Matheson Radio Company, Inc., licensee of Radiobroadcast Station WHDH, Boston, Massachusetts, for a permit to increase the power of Station WHDH from 1 kw to 5 kw and hours of operation from daytime and until sunset at Denver, Colorado, to unlimited time, with directional antenna at night. The application was designated for hearing by the Commission on January 3, 1939, and afterwards upon further consideration was scheduled for hearing pursuant to

a hearing notice dated September 2, 1939. On September 15, 1939, the petition of Berks Broadcasting Company (WEEU) to intervene in the hearing was granted. On September 29, 1939, a petition to intervene, filed by National Broadcasting Company as licensee of Station KOA, and a similar petition, filed by Columbia Broadcasting System, Inc., as licensee of Station WABC, were denied. On October 6, a petition of the Northern Corporation (WMEX) to intervene was denied. On October 10, 1939, the Commission denied a petition of National Broadcasting Company, Inc. (KOA), requesting review of the action of September 29, 1939, denying its petition to intervene. The hearing of the matter was continued indefinitely by the Commission by order dated October 12, 1939, but thereafter, on October 29, 1939, the case was again scheduled for hearing. An amended notice of hearing was issued December 2, 1939. On December 6, 1939, a petition and supplemental petition to intervene, filed by the licensees of 13 broadcast stations, referred to therein as the "c[illegible]r channel group", a motion to dismiss the application or eliminate certain issues of the hearing notice, filed by the same group of licensees, and a motion to dismiss the application filed by the National Broadcasting Company, Inc., as licensee of KOA, were dismissed. A hearing was held on the application January 29 and 30, 1940, before an officer designated by the Commission to conduct the proceedings. Proposed findings and motions to strike the intervention and the testimony of Berks Broadcasting Company (WEEU) were filed by applicant March 15, 1940. The intervener filed proposed findings March 15, 1940, and on March 28, 1940, filed an answer to applicant's motion to strike the intervention of Berks Broadcasting Company and the testimony adduced by the latter.

518 2. The amended notice of hearing upon the application, issued by the Commission December 2, 1939, contains the following statement of matters to be determined:

"1. To determine whether or not the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (part 3) properly interpreted and applied preclude the granting of the application;

2. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with stations KOA, WRUF, WEEU and WABC;

3. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with Station WRUF operating as proposed in its pending application (File No. B3-P-2408)."

3. Station WHDH, which is located at Boston, Massachusetts, is licensed to operate on the frequency 830 kc with 1 kw power with time of operation restricted to daytime and evening time preceding sunset at Denver, Colorado.

4. Station KOA, which is located at Denver, Colorado, is licensed to operate on the frequency 830 kc with 50 kw power and unlimited hours of operation.

5. The operating assignments of Stations WHDH and KOA, as provided in the licenses of these stations, comply with the following provisions of Sections 3.22 and 3.25 of the Commission's Rules:

"Sec. 3.22 Classes and power of standard broadcast stations.—(a) Class I station.—A 'class I station' is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in accordance with the channel designation in section 3.25 or in accordance with the 'Engineering Standards of Allocation.' The operating power shall be not less than 10 kilowatts nor more than 50 kilowatts."

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"Sec. 3.25 Clear channels; classes I and II.—The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations as given; (a) To each of the channels below there will be assigned one class I station and there may be assigned
519 one or more class II stations operating limited time or daytime only: 640, 650, 660, 670, 700, 720, 740, 750, 760, 770, 800, 810, 820, 830, 850, 860, 870, 980, 990, 1000, 1070, 1090, 1130, 1150, 1170, and 1190 kilocycles. The power of the Class I stations on these channels shall not be less than 50 kilowatts."

6. The applicant requests that Station WHDH be authorized to operate unlimited hours on the frequency 830 kc, asserting that such operation would tend to accomplish maximum service to the public, and for that reason would not be inconsistent with the purposes for which Rules 3.22 and 3.25 were promulgated. But the Commission finds upon examination of the matter that the issuance of an authorization as applied for by applicant would not be in accordance with Section 3.25 of its Rules. Section 3.25 (a) of the Rules limits the use of the frequency 830 kc to one full-time station of 50 kw power; the applicant proposes to operate its station nighttime simultaneously with the station already assigned to the frequency.

7. In designating the instant application for hearing, however, the Commission specified certain issues, designed to provide for examination of evidence with respect to the nature, extent and effect of any interference which might be expected to result from operation of Station WHDH in the manner proposed by applicant. Upon consideration of the evidence material to these issues, it is concluded that operation of Station WHDH nighttime, with directional antenna, as proposed by applicant, would not cause any interference to the primary service of Station KOA, Denver Colorado, and that such interference as the proposed operation of WHDH might reasonably be expected to cause to reception of KOA would be limited to receivers in the

eastern half of the United States. Any use which might be made of the signal of KOA in the area where same might be affected by proposed operation of WHDH would be dependent upon the characteristics of the individual receiver, the signal intensity available, and signal to interference ratio involved in each individual case.

8. The operation of WHDH as proposed by applicant would not cause objectionable interference to Stations WRUF, WEEU or WABC.

9. The application of Station WRUF, File No. B3-P-2408, which was pending when this application was designated for hearing has been withdrawn.

10. The granting of a permit therefor and operation of Station WHDH as proposed by applicant will enable it to deliver service of primary signal quality to an area having a population of 3,093,000 or to 621,000 more people than are now included within the primary service area of the station. The hours of operation of applicant station will be extended two and one-half hours during summer months, and a maximum of five and one-half hours during winter months. This will provide a new primary service to 94.9% of the Boston metropolitan area, including a population of 2,185,000. In addition to the aforementioned improvements and extension of service to residents in the Boston area, there will be an improvement and extension of service which applicant station now endeavors to render over the fishing banks situated off the New England coast.

520 11. Upon examination and consideration of the evidence adduced with respect to the proposed use of the frequency 830 nighttime at Boston simultaneously with the present use of the frequency at Denver, the Commission finds that such operation would permit more efficient use of the frequency and has concluded to amend its rules by striking the reference to the frequency 830 kc from Subsection (a) of Section 3.25, and by adding the figure 830 immediately following the figure 790 in Subsection (b) of Section 3.25.

Conclusions

1. The operation of Station WHDH as proposed herein will not cause interference to the primary service of any station, and any interference which such operation may reasonably be expected to cause to Station KOA, Denver, will be limited to interference with intermittent reception upon receivers located in the eastern part of the United States, remote from the station.

2. The proposed change in the provisions of Rule 3.25 and the granting of the application of Matheson Radio Company, Inc. will permit of more efficient use of the frequency 830 kc, and serve public interest, convenience and necessity.

3. Applicant's motion to strike the intervention of Berks Broadcasting Company should be denied, the Commission being of the opinion that applicant has not presented any reason why the intervention should not have been allowed in the first instance or any reason why the intervener after becoming a party to the proceeding should not be permitted to continue as such until a final determination is made of the matter.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE,
Secretary.

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521 Commissioners Norman S. Case and T. A. M. Craven Dissent from the Proposed Findings of Fact and Conclusions of the Commission, and Believe that the Proposed Findings of Fact and Conclusions of the Commission Should Have Read as Follows:

Findings of Fact

1. These proceedings arose upon the application of Matheson Radio Company, Inc., licensee of Radiobroadcast Station WHDH, Boston, Massachusetts, for a permit to increase the power of Station WHDH from 1 kw to 5 kw and hours of operation from daytime and until sunset at Den-

ver, Colorado to unlimited time, with directional antenna at night, on the frequency 830 kc. The application was designated for hearing by the Commission on January 3, 1939, and afterwards upon further consideration was scheduled for hearing pursuant to a hearing notice dated September 2, 1939. On September 15, 1939, the petition of Berks Broadcasting Company (WEEU) to intervene in the hearing was granted. On September 20, 1939, a petition of National Broadcasting Company to intervene as licensee of Station KOA, and a petition of Columbia Broadcasting System, Inc., to intervene as licensee of WABC, were denied. On October 6, a petition of the Northern Corporation (WMEX) to intervene was denied. On October 10, 1939, the Commission denied a petition of National Broadcasting Company, Inc. (KOA), requesting review of
522 the action of September 29, 1939, denying its petition to intervene. The hearing of the matter was continued indefinitely by the Commission by order dated October 12, 1939, but thereafter, on October 29, 1939, the case was again scheduled for hearing. An amended notice of hearing was issued December 2, 1939. On December 6, 1939, a petition and supplemental petition to intervene, filed by the licensees of 13 broadcast stations, referred to therein as the "clear channel group", a motion to dismiss the application or eliminate certain issues of the hearing notice, filed by the same group of licensees, and a motion to dismiss the application filed by the National Broadcasting Company, Inc., as licensee of KOA, were dismissed. A hearing was held on the application January 29 and 30, 1940, before an officer designated by the Commission to conduct the proceedings. Proposed findings and motions to strike the intervention and the testimony of Berks Broadcasting Company (WEEU) were filed by applicant March 15, 1940. The intervener filed proposed findings March 15, 1940, and on March 28, 1940, filed an answer to applicant's motion to strike the intervention of Berks Broadcasting Company and the testimony adduced by the latter.

2. The amended notice of hearing upon the application issued by the Commission December 2, 1939, contains the following statement of matters to be determined:

"1. To determine whether or not the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (part 3) properly interpreted and applied preclude the granting of the application;

2. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with stations KOA, WRUF, WEEU and WABC;

3. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with Station WRUF operating as proposed in its pending application (File No. B3-P-2408)."

3. Station WHDH, which is located at Boston, Massachusetts, is licensed for operation on the frequency 830 kc with 1 kw power daytime hours and until sunset at Denver, Colorado.

4. Station KOA is licensed to operate on the frequency 830 kc at Denver, Colorado, with 50 kw power and unlimited hours of operation, and is classified as a Class I station under the following provision of Sec. 3.22 of the Commission's Rules:

"Sec. 3.22—Classes and power of standard broadcast stations.—(a) Class I station.—A 'class I station' is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary
523 service area is free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in accordance with the 'Engineering Standards of Allocation'. The operating power

shall be not less than 10 kilowatts nor more than 50 kilowatts."

5. The frequency 830 kc, along with certain other frequencies, is allocated for use during nighttime hours by one 50 kw station (class I) by a regulation of the Commission, as follows:

"Sec. 3.25—Clear channels; classes I and II.—The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations as given:

(a) To each of the channels below there will be assigned one class I station and there may be assigned one or more class II stations operating limited time or daytime only: 640, 650, 660, 670, 700, 720, 740, 750, 760, 770, 800, 810, 820, 830, 850, 860, 870, 980, 990, 1000, 1070, 1090, 1130, 1150, 1170, and 1190 kilocycles. The power of the Class I stations on these channels shall not be less than 50 kilowatts."

6. The applicant requests the Commission to authorize the operation of WHDH unlimited time on the frequency 830 kc simultaneously with the clear channel station now assigned to the frequency, notwithstanding the provisions of Sections 3.22 and 3.25 of the Commission's regulations. At the same time the applicant takes the position (in its appearance, in a statement during the course of the hearing and in its proposed findings) that it is not attacking the regulations or suggesting an amendment, change, or modification thereof; and asserts that it offers no argument that the regulations in their general application do not serve public interest, convenience, or necessity.

7. The application clearly is not consistent with the provisions of Sections 3.22 and 3.25 of the Commission's Regulations. No construction, interpretation or application of these regulations has been shown or suggested in the matters submitted by applicant, which would permit the granting of the authority requested without allowing an exception to the application of the regulations.

8. The Commission denied petitions from the licensee of Station KOA and others on the 830 kilocycle channel to participate in the hearing of the instant application. Likewise, the Commission denied the petition of a group of licensees operating stations in accord with Rule 3.25 (a), to participate in this hearing which involves a change of the aforesaid rule. Changing a basic rule of the Commission in a specific case while at the same time denying parties, who may be affected adversely by such change, the
524 right to participate in the hearing of the case is questionable legal procedure. Furthermore, such a procedure cannot safeguard the interest of the public when, as in this case, all evidence which may have a bearing on the important phases of this national problem of broadcasting cannot be available in the record of the hearing.

9. The applicant contends that operation of WHDH nighttime, simultaneously with KOA would not cause interference to the latter, but the testimony on this question is not in agreement. An expert in radio engineering, appearing as a consultant of applicant and as a witness in support of the application, testified that a usable service would not be provided beyond the calculated 500 microvolt signal intensity 50% of the time, field strength contour of Station KOA, and that no interference would be caused within the 500 microvolt 50% field intensity contour for the reason that it would not be reached by the 25 microvolt 10% of the time contour of WHDH, operating as proposed. The twenty to one or greater advantage in field strength ratio which KOA would have at its 500 microvolt 50% contour under the conditions proposed, is recognized as adequate to prevent objectionable interference. The applicant's projection of the WHDH 25 microvolt 10% contour extends from northern Minnesota to western New York and thence to Louisiana.

10. An expert from the Commission's staff testified that in the absence of unfavorable noise levels and interference to reception caused by signals of other stations, field intensities considerably below the value of 500 microvolts 50%

of the time provide usable service. The testimony of this witness also shows the fact that skywave field intensities such as those under consideration, are subject to wide variations in strength, from hour to hour, day to day, and week to week. It was calc lated that KOA would have a field strength of approximately 166 microvolts or greater 90% of the time at the same range where it would have a field of 500 microvolts 50% of the time. It was shown in this connection, that no sharp line of demarcation could be drawn between the areas where KOA would and would not deliver a usable signal.

11. There is also disagreement in the testimony with respect to the effect of operation of stations on adjacent channels upon the usability of the signal of KOA. It was shown that the effect of the signals from stations on adjacent channels would be determined in a large measure by the characteristics of the receiving equipment employed by the listeners.

12. The applicant showed that the signal of KOA is now subject to interference in certain areas from certain foreign stations, particularly CMHI, Santa Clara, Cuba, which operates on 830 kc with 5 kw power. This interference, however, will be eliminated when the changes in allocation contemplated by the North American Regional Broadcasting Agreement are completed. Under the provisions of the agreement KOA, if listed as a Class I station, will be entitled to protection against signals from foreign stations exceeding 25 microvolts (night) or 5 microvolts (day) at the boundary of the United States.

525 13. Upon consideration of all the evidence material to the issue, it is concluded that operation of WHDH as proposed herein would cause interference to the reception of service rendered by Station KOA in its extended secondary service area. The usefulness of this service is dependent upon the characteristics of the individual receiver, the signal intensity, available, and the signal to interference ratio involved in each individual case.

14. The operation of WHDH as proposed by applicant would not cause objectionable interference to Stations WRUF, WEEU or WABC.

15. The application of Station WRUF, File No. B3-P-2048, was withdrawn by applicant prior to the hearing of this matter.

Discussion

1. A conclusion to grant in full the instant application of WHDH can be reached only by applying the engineering standards specified for the clear channels of Rule 3.25 (b) to the clear channels of Rule 3.25 (a).

2. Therefore, it is important to review here the engineering standards which the Commission has recognized hitherto as being the best engineering practice. These make it possible for a clear channel station, operating under Rule 3.25 (a), to render primary service to a distance of from 50 to 100 miles, depending upon propagation conditions. While this primary service is constant under any specific condition, its technical quality varies in proportion to the amount of natural noise present in the background of the program as heard in the receiver of the listener. Usually, with any specified power the farther a listener is from a transmitter, the poorer the quality of received primary service. In addition to primary service, which is available both day and night, it is possible for a station operating in accord with Rule 3.25 (a) to render a secondary service at night. However, because of weaker signals and because of variation in the signal intensity from minute to minute, hour to hour, day to day, and year to year, all secondary service is inferior to primary service. The secondary service of a 50 kw clear channel station operating in accord with Rule 3.22 and 3.25 (a) may be grouped arbitrarily for purposes of this discussion into four grades of intermittent service, namely, (1) Good, beginning at about 100 miles and extending to approximately 400 miles from the transmitter; (2) Satisfactory, beginning at about 400 miles and extending to about 700 miles from the station; (3) Poor, beginning

at about 700 miles and extending to about 1000 miles from the station; and (4) Occasional, beginning at more than 1000 miles from the transmitter. The grade of service is dependent upon the amount of fading, and upon the strength of the received signal as compared to the loudness of natural noises also heard in the receiver. While it is possible to change the character of these grades of service at any specific point by raising or lowering the power at the transmitter, the maximum power now permitted by the Commission is 50 kilowatts.

526 3. The service from clear channel stations operating under Rule 3.25(b) is limited by the permissive introduction of radio interference. For this reason these stations are capable only of rendering secondary service to a much smaller area than are stations operating under Rule 3.25(a). In an attempt to provide means to control the amount of this interference to secondary service, the Commission accepted the advice of the radio engineers of the country. For stations operating under Rule 3.25(b) the Commission decided arbitrarily that interference to the secondary service rendered by such stations would be objectionable if it exceeds 25 microvolts more than 10% of the time when measured where the secondary service signal from the desired station has a value of 500 microvolts 50% of the time. This arbitrary method of evaluating and measuring the interference is necessary to secure some semblance of tangibility under conditions of unpredictable variation at any specific point. The standard applied here is not intended to indicate that clear channel stations operating under Rule 3.25(b) render an interference-free secondary service to the 500 microvolt contour and that thereafter the service is degraded. Much of the secondary service of a clear channel station operating under Rule 3.25(b) may be inferior in technical quality as compared to that of a clear channel station operating under Rule 3.25(a).

4. Many radio listeners in the nation must not only rely upon secondary service from clear channel stations for the

only broadcast service available to them but also millions of listeners now rely upon a low grade of secondary service in order to enjoy any broadcasting whatsoever. The most important problem confronting the Commission is to provide an improved radio service to these rural listeners. It appears that in any successful solution of this problem of rural broadcast coverage the Commission must rely primarily upon clear channel stations operating in accord with both Rule 3.25(a) and Rule 3.25(b).

5. Before adopting the engineering standards provided for in the existing Rules, the Commission in a public hearing considered the engineering opinion of the nation. The preponderant engineering opinion of the nation was that at least 25 clear channels of the type specified in Rule 3.25(a) were necessary to insure good nighttime broadcast service with a choice of only two programs to millions of persons residing in remote rural regions.

6. All the channels now provided in Rules 3.25(a) and 3.25(b) are barely sufficient to provide service for the rural areas of the country at night. Much of the rural areas receive no service in the daytime. Therefore, any reduction in the number of either of these classs of clear channels would handicap the Commission in providing the much needed improvement in rural coverage. This becomes obvious when it is assumed (1) that the listeners in rural areas are entitled to a choice of a minimum of four different programs, such as now provided to radio listeners in most of the metropolitan centers of the nation; (2) that the engineers of the country are correct in their assertion that each rural listener having available only secondary service must have signals available from at least two stations transmitting the same program in order to obtain a reasonable degree of continuity of service; and (3) that to secure the most ideal geographical distribution of clear channel stations from the standpoint of rural coverage, it would be necessary to disregard natural economic laws and establish such stations in places remote from markets and the centers of talent.

527 7. The technical quality of radio service in our cities is superior to that now rendered rural areas throughout the nation. Therefore, any course of action which handicaps the future ability of the Commission to equalize quality of service between cities and rural areas would be classed as discrimination against the rural population. A reduction of the number of clear channels may easily result in real discrimination against rural listeners in favor of the population living in metropolitan centers.

8. In the consideration of the important rural phase of the national radio broadcasting problem, the Commission must balance the effect of Paragraph B, 8(d) of Part II of the North American Regional Broadcasting Agreement, which reads as follows:

"(d) If within the period of this Agreement the country to which a clear channel has been assigned shall have made use of the channel but not in the manner above prescribed or not to the extent required by the provisions of this Agreement, such country shall be considered as having relinquished that portion of the rights which it has not used and at the expiration of this Agreement the other countries party thereto shall have the right, if they see fit, to withdraw the unused privileges from such country and to reassign them to any or all of the other interested countries."

9. This treaty provision should be interpreted in the light of international practice and international law. It means that if the United States should degrade the service on a particular class of radio channel on which it now has prior rights, the United States would lose its right to protection against the use of such channel in like manner by other nations. For example, if the United States now designates a station to operate in accordance with the Commission's Rule 3.25(a), other nations must not permit stations within their borders to operate in such a manner as to cause interference to the service of the United States'

station within the borders of the United States. On the other hand, if the United States should, by its own action, degrade the service rendered on one of its clear channels by licensing stations in accord with Rule 3.25(b) instead of Rule 3.25(a), other nations may, at a future date, take advantage of this situation and designate their stations to operate on the same channel in a manner which will cause interference within the borders of the United States. Therefore, if the United States should designate all of the channels now reserved under Rule 3.25(a) for the use of stations operating in accord with Rule 3.25(b), the United States would be severely handicapped in its future solution of its most important national radio technical problem.

10. The Commission has likewise recognized in its rules the necessity for coping with the practical situation inherent in the problem of distributing fairly to the vast number of communities of the nation the use of the relatively few radio broadcasting channels. This is accomplished by providing a large number of channels for regional and local stations.

528 11. Regional and local stations render no secondary service because several stations operate simultaneously on the same channel. This service is cut off by interference which the Commission must permit in order to solve the practical problem of distributing facilities to the various communities of the nation. Furthermore, at night the primary service of regional and local stations is considerably limited in area as compared to the area served by any class of clear channel station, thereby increasing the need in rural areas for clear channel service at night. Generally speaking, regional and local stations are ineffective as a means of solving the national problem of rural radio service at night.

12. In effect, the instant application of WHDH proposes to render an unlimited time regional station service primarily to the metropolitan district of Boston, which is already saturated with radio service from several other sta-

tions. In order to accomplish this, it is necessary to change Rule 3.25(a) so that WHDH may operate as a Class II station in the manner provided for this class in Rule 3.25(b).

13. A grant of full time operation to the licensee of WHDH might enable that licensee to survive with less effort under the strenuous competitive conditions which now confront him in Boston. Unfortunately, however, in considering this desire of the licensee of WHDH to improve his economic situation the Commission should not fail to consider likewise the paramount issues affecting the public of the nation as a whole.

14. A substantial improvement in the technical quality of service rendered by WHDH to the listeners of Boston can be obtained by granting the application in part, even though the Commission denies that part of the proposal which hinders the proper solution of the national problem. The issue thus may be narrowed to the question of whether rural listeners of the nation shall be handicapped in obtaining an improved broadcast service, or whether the people of the metropolitan district of Boston, already enjoying radio service from many stations, shall have an opportunity to listen on an average throughout the year for four hours a day longer to the service of WHDH. (The limits of the extension of time are 5½ hours per day in December and 2½ hours per day in July.)

15. In this issue it has not been demonstrated convincingly that the people of Boston will receive better radio service generally. However, if it be assumed that nothing need be done to improve broadcast service to the rural population of the nation, one may argue that the isolated case presented here by WHDH has merit. It can be stated in this argument that under present conditions at KOA, if WHDH is permitted to operate simultaneously at night with KOA on the channel, the only rural listeners who would be deprived of service from KOA reside in the occasional and poor secondary service areas, and those portions

of the satisfactory secondary service area from KOA within the States of North Dakota, Minnesota, Missouri, Arkansas, Oklahoma and Texas. Also it can be argued that listeners in these areas already receive secondary service from other stations and that the technical grade of service now received by them from KOA is not good secondary service and that therefore the operation of WHDH as proposed creates insufficient harm to override the advantages of improved service in Boston.

529 16. On the other hand, listeners in these western areas of the country do not receive either the quality or the variety of service now available to the citizens of Boston. Therefore, to degrade further the service of rural listeners dependent in whole or in part upon KOA and other clear channel stations is an injustice. Moreover, favorable Commission action in an isolated instance of this nature creates a precedent, the mere existence of which may handicap future ability to secure improved broadcast service to rural areas. Therefore, such favorable action in this case would constitute an action resulting ultimately in the establishment of an unsound policy for the nation as a whole. An unsound public policy of this nature obviously would not benefit the listening public. Furthermore, this deterioration of radio service is bound to result in repercussions against the entire radio industry.

17. In this instance, granting in full the application of WHDH would limit the future freedom of action of the Commission in two ways, to wit., (1) it would reduce the needed number of clear channels under Rule 3.25(a), and (2) it would ultimately accord rights to other nations which rights are not now conceded in the North American Regional Broadcast Agreement.

18. If proper weight is given to all of the factors discussed herein it must be concluded that the applicant WHDH has not proved that any advantage which may accrue to him or to the people of the metropolitan district of Boston outweighs the disadvantages of:

A. The application of unsound engineering in the solution of the rural broadcast problem of the nation.

B. The establishment of a precedent which may ultimately result in a discrimination against rural listeners in favor of those listeners living in metropolitan centers.

C. The establishment of a precedent which may result ultimately in handicaping the United States in providing for its people any desirable change in the organization of radio broadcast facilities designed to improve rural coverage.

19. If the Commission desires to degrade any or all of the few clear channels provided in Rule 3.25(a), it would be far better to do so in a manner which benefits some of the underserved rural population of the nation rather than to favor any metropolitan center already surfeited with radio service.

530 *Conclusions*

1. The provisions of the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part 3) properly interpreted and applied, preclude the granting in full the application.

2. Operation of Station WHDH as proposed herein would cause interference to reception of KOA in its extended secondary service area, but would not cause interference to Stations WRUF, WEEU or WABC.

3. The application of WRUF which was pending when the instant case was scheduled for hearing has been withdrawn.

4. That part of the application of WHDH which requests unlimited time of operation should be denied for the reason that it is not consistent with the provisions of Section 3.22 and 3.25 of the Commission's Rules Governing Standard Broadcast Stations.

5. That part of the application which requests an increase in power should be granted.

6. Applicant's motion to strike the intervention of Berks Broadcasting Company should be denied, the Commission

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being of the opinion that applicant has not presented any reason why the intervention should not have been allowed in the first instance or any reason why the intervener after becoming a party to the proceeding should not be permitted to continue as such until a final determination is made of the matter.

• • • • • • • • • • •

541 *Petition to Intervene*

National Broadcasting Company, Inc., petitions for leave to intervene in the above entitled matter. In support of its petition it avers:

1. Petitioner is, and for many years has been, the licensee and operator of station KOA at Denver, Colorado. Since 1928 Station KOA has been the dominant clear channel station assigned to the frequency of 830 kc which frequency has been continuously designated throughout this period as a clear channel upon which no second station would be permitted to cause interference at night.

2. The application of Matheson Radio Company, Inc. requests duplicate night operation for Station WHDH at Boston on 830 kc.

3. At the time said WHDH application was filed it was, it is now, and at all intervening times has been an application for hours of operation for which station WHDH was and is inelligible under the Commission's Rules; to-wit, under Rule 116 prior to August 1, 1939 and under Sections 3.22 and 3.25 (a) since August 1, 1939.

4. At the time said application was filed, at the present time, and at all times intervening the Rules of the Commission have provided that such applications will not be considered by the Commission but will be returned to the applicant by the Secretary with a brief statement of the respect in which such application is defective; to-wit, prior to January 1, 1939 under Rule 102.1; between January 1, 1939 and July 31, 1939 under Section 4.02 of the Commission's Rules of Practice and Procedure; since August 1,

1939 under Paragraph 1.72 of the Commission's Rules of Practice and Procedure.

5. Section 1.71 of the Commission's Rules of Practice and Procedure provides:

"That in cases where an applicant desires a modification of a rule or regulation he shall submit a formal petition setting forth the desired change and the reasons in support thereof."

In this proceeding applicant has never submitted
542 such a petition, nor has it, at any time, proposed a change in any of the Commission's Rules or Regulations. On the contrary, the applicant has repeatedly denied that it sought a change in any Commission Rule.

6. Notwithstanding that applicant had requested no change in the Commission's Rules, the Commission's first Notice of Hearing issued on September 2, 1939 set forth as one of the issues to be considered:

"3. To determine whether public interest, convenience or necessity would be served by modifying the rules governing standard broadcast stations, particularly Sections 3.22 and 3.25 (Part 3), to authorize the operation of WHDH as proposed."

On September 23, 1939 Petitioner herein filed a Petition to Intervene in the hearing schedules to be held upon the WHDH application on October 10, 1939. Said Petition to Intervene was denied by Order of Commissioner George Henry Payne on October 2, 1939. A Petition for Review of Commissioner Payne's action under Section 1.256 was denied by the Commission on October 10, 1939.

7. On September 29, 1939 Petitioner herein had also filed a Motion to Dismiss the WHDH application. No action was taken upon this Motion to Dismiss until December 5, 1939 at which time it was denied without prejudice by Commissioner Case. In the meantime, on December 2, 1939 the Commission had issued a second Notice of Hearing to replace the first Notice of Hearing dated September 2,

1939. The Paragraph numbered 3, which has been quoted above, did not appear in the second notice. In lieu thereof Paragraph 1 of the second notice read as follows:

"1. To determine whether or not the Commission's Rules governing standard broadcast stations, particularly Section 3.22 and 3.25 (Part III), properly interpreted and applied preclude the granting of the application."

Upon this notice and upon this issue a hearing was held on January 29, 1940.

8. On December 9, 1940 the Commission released its "Proposed Findings of Fact and Conclusions of the Commission (hereinafter designated 'majority findings')" in which it is proposed that Section 3.25 of the Commission's Rules be amended and that the application of WHDH be granted.

9. Petitioner avers that the majority findings herein, if adopted by the Commission, will:

543 (a) Result in interference to Station KOA in areas where KOA's signals are now interference free.

(b) Result in a modification of Petitioner's license to operate KOA both with respect to the Commission's Rules and Regulations, and with respect to the North American Regional Broadcast Agreement without having afforded Petitioner an opportunity to be heard contrary to Section 312(b) of the Communications Act of 1934.

(c) Result in a modification of the Commission's Regulations without having afforded Petitioner an opportunity to be heard contrary to Section 303(f) of the Communications Act.

(d) Result in a degradation of service on 830 kc which will be prejudicial to the priority rights in the United States on this channel, will discriminate against service to rural listeners in order to furnish additional service to the City of Boston which is already well served and will be violative of the requirement in Section 307(b) of the Communications Act of 1934 that

"The Commission shall make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same."

(e) Constitute a change of policy and a new kind of use of frequencies after a hearing before an examiner contrary to Section 409(a) of the Communications Act.

(f) Be contrary to the standard of public interest, convenience or necessity.

(g) Aggrieve and adversely affect the interests of Petitioner without affording Petitioner an opportunity to be heard.

Wherefore Petitioner respectfully requests that it be permitted to intervene in this proceeding in order that, as a party, it may:

1. Renew its Motion to Dismiss the WHDH application.

2. File a Motion to Reopen the proceeding in order to afford Petitioner an opportunity to introduce evidence to cross examine all witnesses and otherwise to participate fully in the proceedings.

3. Upon such record file proposed Findings of Fact and Conclusions of Law.

4. Have the right to file Exceptions to any proposed Commission decision thereafter issued.

5. Request Oral Argument upon such proposed decision and upon its Exceptions thereto.

544 6. In all respects participate fully in the important issues involved in the application of Matheson Radio Company, Inc.

Respectfully submitted,

NATIONAL BROADCASTING COMPANY, INC.

By PHILIP J. HENNESSEY, JR.,
201 Normandy Building,
Washington, D. C.
Its Attorney

566 *Order*

The Commission, having under consideration the petition filed by the National Broadcasting Company (KOA), to intervene in the hearing before the Commission on the above-entitled application and the opposition thereto filed by the applicant,

It is ordered, this 7th day of January, 1941 that the petition be, and the same is hereby, denied.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

* * * * * * * * * *

753 *Order*

At a general session of the Federal Communications Commission held at its offices in Washington, D. C., on the 26th day of March, 1941,

The Commission having under consideration the proceedings upon the application of Matheson Radio Company, Ins., Boston, Massachusetts, Docket 5453, for construction permit to increase the power of Station WHDH from 1 kw to 5 kw and the hours of operation from daytime and until sunset at Denver, Colorado, to unlimited time, using directional antenna at night; and

IT APPEARING that Proposed Findings of Fact and Conclusions of the Commission (B-121) were made and entered therein on December 5, 1940; that exceptions thereto and request for oral argument was filed by the Berks Broadcasting Company (WEEU), intervener, and that the Commission allowed participation in the oral argument and the filing of briefs *amici curiae* by National Broadcasting Company (KOA) and the so-called "Clear Channel Group", and that oral argument was held thereon before the Commission on February 20, 1941; and

The Commission having considered fully the entire record in the said proceedings, including said Proposed Find-

ings of Fact and Conclusions of the Commission, the exceptions filed thereto, the arguments thereon, and the briefs *amici curiae* filed by National Broadcasting Company (KOA) and the "Clear Channel Group", and being fully advised in the premises,

IT IS ORDERED, That said Proposed Findings of Fact and Conclusions of the Commission BE, AND THE SAME ARE, HEREBY MADE A PART HEREOF BY REFERENCE AND ADOPTED as the final Findings of
754 Fact and Conclusions of the Commission;

IT IS FURTHR ORDERED, That the Rules and Regulations governing standard broadcast stations, as amended pursuant to the Commission's Order of September 11, 1940, BE, AND THE SAME ARE, HEREBY AMENDED by striking the figure 850 from Subsection (a) of Section 3.25, and adding the figure 850 immediately following the figure 810 in Subsection (b) of Section 3.25; and

IT IS FURTHER ORDERED, That the application of Matheson Radio Company, Inc. (WHDH) for construction permit, Docket 5453, BE, AND IT IS HEREBY, GRANTED.

This Order shall become effective April 7, 1941.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

* * * * * * * * * *

755 *For Construction Permit*

Case and Craven, Commissioners, dissenting.

This application was filed and prosecuted in violation of a rule of this Commission promulgated after a general hearing in which the whole industry, including this applicant, was represented. Other licensees of this Commission who applied were denied the right to intervene in the hearing of this particular case. No petition was filed by this applicant to waive or modify the rule for this particular

application. In the final order the Commission, on its own motion and without notice to the industry and disregarding its determination of the general policy as promulgated in the rules adopted, has taken the unprecedented action so far as this Commission is concerned of changing a rule in this particular case to allow the granting of this application which was theretofore in violation of the rule.

This invites other applicants to file applications in violation of and without regard to the rules of this Commission. It discriminates against those who have relied upon the rules of the Commission and not filed applications for frequencies which they might desire, and which the rules of the Commission did not permit them to have. This discrimination is inequitable and not in accordance with the best administrative or judicial practices.

We adopt our Proposed Findings of Fact and Conclusions dated December 10, 1940, (mimeograph 45436), wherein we dissented from the Proposed Findings of Fact and Conclusions of the majority, as our Findings of Fact and Conclusions in this case, and hereby incorporate them as part of this dissenting opinion by reference.

767 *Petition of National Broadcasting Company, Inc., For Rehearing.*

Now comes National Broadcasting Company, Inc., (hereinafter referred to as "National" or "Petitioner") and, pursuant to the provisions of Section 405 of the Communications Act of 1934, alleging that it is a person aggrieved and whose interests are adversely affected thereby, requests that the Commission grant a rehearing in the matter of its Decision and Order of April 7, 1941, amending Section 3.25 of its Rules and Regulations and granting the application of Matheson Radio Company, Inc., (hereinafter sometimes referred to as the "Applicant"). In support of this Petition National respectfully represents as follows:

1. Petitioner is the licensee of radio station KOA which said station has been in continuous operation at Denver, Colorado since December 15, 1924. For more than

768 twelve years, prior to the reallocation of stations on March 29, 1941 pursuant to the North American Regional Broadcasting Agreement, KOA had been authorized to operate unlimited time with power of 50 kw on the frequency 830 kc. Under Orders of the Commission effective March 29, 1941 and in conformity with the terms and provisions of the North American Regional Broadcasting Agreement said station is now assigned to the frequency 850 kc.

2. Applicant is the licensee of radio station WHDH at Boston, Massachusetts, which said station was first licensed on June 17, 1929, to operate at Gloucester, Massachusetts, with power of 1 kw on the frequency 830 kc during daytime only or until sunset at Gloucester. By subsequent authorizations, namely, on May 24, 1930 and November 1, 1932 said station was authorized to increase its hours of operation until sunset at Denver and to change its transmitter location to Saugus, Massachusetts. Said station is now also assigned to the frequency 850 kc.

3. Continuously between November 11, 1928 and April 7, 1941 the Rules and Regulations of the Federal Radio Commission and of the Federal Communications Commission provided that the frequency of 830 kc (850 kc) upon which KOA and WHDH were licensed to operate should be classed as a clear channel upon which only one station would be permitted to operate at night. Throughout this period KOA, being classed as the dominant clear channel station, has been authorized and permitted to operate at all times without co-channel interference at night from any other station in the United States. Since 1928 KOA has been protected from co-channel interference from any Canadian sta-
769 tion pursuant to agreements existing between the Governments of the United States and Canada. Since March 29, 1941, (except for the action taken by the Commission in this proceeding on April 7, 1941) KOA's service and service area within the United States has also been entitled to protection from all stations in Canada, Mexico and Cuba under the provisions of the North American Regional Broadcasting Agreement.

4. Since December 18, 1935, the Rules and Regulations of the Commission have contained the following provisions now found in Section 1.72 of said Rules and Regulations:

"Any application which is not filed in accordance with the Commission's Regulations will be considered defective. * * * Such defective applications will not be considered by the Commission, but will be returned to the applicant by the Secretary, with a brief statement of the respect in which it is defective."

5. Since August 1, 1939, Section 1.71 of the Commission's Rules and Regulations has contained the following provisions:

"Each application for an instrument of authorization shall comply with the Commission's Rules and Regulations and shall be made in writing, subscribed and verified as provided in Section 1.121 on a form furnished by or in the manner prescribed by the Commission: * * * Provided, further, that in cases where an applicant desires a modification of a Rule or Regulation he shall submit a formal Petition setting forth the desired change and the reasons in support thereof. The required forms may be obtained from the Commission or from any of its field offices. (For a list of such offices and related geographical districts see appendix No. 3)."

770 6. The application of Matheson Radio Company, Inc., granted by the Commission on April 7, 1941, requested the use of power of 5 kw with a directional antenna during unlimited hours of operation.[1] Said application was filed July 27, 1938.[2] Neither the application nor any other

[1] Between 1929 and 1938, notwithstanding that Regulations of the Commission at all times prohibited a second station operating at night on the frequency 830 kc, applicant filed nine separate applications, each of which requested the unlimited time operation of WHDH on the frequency 830 kc. All of these applications prior to the one involved in the instant case (dated July 27, 1938) were dismissed or denied by the Commission.

[2] Between June 6 and June 30, 1938, the Commission conducted a general legislative hearing for the purpose of re-examining the existing allocation structure and of determining, among other things, what if any changes should be made in its Rules and Regulations relating to clear channel stations and clear channel service. Applicant appeared at this hearing and urged modification of the Commission's Rules so as to permit operation of WHDH during night

document submitted by the applicant with said application or relating thereto requested a modification of Section 3.25 of the Commission's Rules and Regulations. On the contrary the applicant has repeatedly denied that it desired to urge any change in or modification of the Commission's Rules and Regulations.[3]

7. On January 3, 1939, and notwithstanding the procedural requirements of the Commission's Rules and Regulations and the applicant's failure to meet the same,
771 the Commission designated the WHDH application for hearing before Commissioner Case. Its Notice of Hearing dated September 2, 1939, specified the following issues:

1. To determine whether the interests of any other stations may be adversely affected by reason of interference, particularly stations KOA, WRUF, WEEU and WABC;

2. Because of the pendency of another application with which conflict may be had by reason of interference, ie; B3-P-2408 (WRUF);

3. To determine whether public interest, convenience or necessity would be served by modifying the Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25; (Part III), to authorize the operation of WHDH as proposed;

4. To determine whether station WHDH, operating as proposed on 830 kc with 5 kw power would render the type of service for which said frequency is designed under the

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time (Docket 5072-A stenographic transcript pages 1897-1907; NAB Reprint pages 316-17). But the Commission on June 23, 1939 promulgated Rules effective August 1, 1939, Sections 3.22 and 3.25 of which reaffirmed the status of the frequency 830 kc and retained that frequency as a clear channel upon which not more than one station would be permitted to operate during night time.

[3] On October 6, 1939 in a pleading entitled "Opposition To Motions To Dismiss and Explanation of Application" applicant stated: "It (the WHDH application) reveals that applicant is not asking to repeal a Regulation of the Commission. Applicant is asking not for the Rule to be abrogated, but that an exception be made in applying it in the interests of serving the Boston area." At page 14 of the Transcript of testimony applicant's counsel stated: "Mr. Examiner, I propose to make it clear before we start that we are not suggesting an amendment, or change or a modification of the Rule; we are not attacking the Rule."

Commission's plan of allocation and Standards of Good Engineering Practice.

8. On February 23, 1939, Petitioner filed a Petition to Intervene in any proceedings relating to the WHDH application. In said Petition it was alleged, among other things, that the operation of WHDH as proposed would cause interference to KOA in areas where KOA's signal is now interference free; that Petitioner would be aggrieved and its interests adversely affected should WHDH be authorized to operate as proposed; and that the operation of WHDH as proposed; would not be in the public interest, convenience and necessity. This Petition to Interference was
772 denied by Commissioner Payne on October 2, 1940 and, on October 10, 1940, a Petition to Review his action, filed under Section 1.256, was also denied by the Commission.

9. On September 29, 1939, Petitioner filed a Motion to Dismiss the WHDH application because said application was patently in conflict with Sections 3.22 and 3.25 of the Commission's Rules and Regulations and because of the failure of the applicant to conform to the requirements of Section 1.71 of the Commission's Rules and Regulations. The relief requested by Petitioner was that the hearing then scheduled upon said application be cancelled and that the application be dismissed and returned to the applicant. This Motion was denied by the Commission on December 5, 1939.

10. On December 2, 1939, the Commission, on its own motion, issued a second Notice of Hearing to replace the Notice originally issued on September 2, 1939, as aforesaid, which said Notice specified the following issues:

1. To determine whether or not the Commission's Rules and Regulations Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III) properly interpreted and applied preclude the granting of the application.

2. To determine the nature, extent and effect of any interference which would result should the applicant's pro-

posed station operate simultaneously with stations KOA, WRUF, WEEU and WABC;

3. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with stations WRUF operating as proposed in its pending application (File B3-P-2408).

773 11. On January 29, 1940, a hearing was held upon the second or substituted Notice of Hearing before an Examiner of the Commission which said hearing was followed on December 9, 1940, by the issuance of the Commission's "Proposed Findings of Fact and Conclusions". In said "Proposed Findings of Fact and Conclusions" three of the five members of the Commission present and participating proposed that Section 3.25 of the Commission's Rules and the Regulations be amended so as to alter the status of the frequency 830 kc to permit the nighttime operation of WHDH as proposed in the pending application and also recommended that said application be granted. Two Commissioners dissented in a separate opinion released on the same day. The sixth Commissioner did not participate and, at that time, there was one vacancy on the Commission. All five Commissioners participating in the action agreed that, properly interpreted and applied, the Commission's Rules prohibited the simultaneous night operation of KOA and WHDH (Majority Findings paragraph 7, Dissent paragraph 6).

12. On December 16, 1940, and after being advised of the contents of the Commission's "Proposed Findings of Fact and Conclusions", Petitioner filed a second Petition to Intervene in which, among other things, it requested that it be permitted to:

(a) File a motion to reopen the proceedings in order to afford Petitioner an opportunity to introduce evidence, cross examine all witnesses and otherwise participate fully in the proceedings.

(b) Upon such record file Proposed Findings of Fact and Conclusions of Law.

(c) Have the right to file exceptions to any proposed Commission Decision thereafter issued.

774 (d) Request Oral Argument upon such decision and upon exceptions thereto and

(e) In all respects participate fully in the important issues involved in the application of Matheson Radio Company, Inc.

Said Petition was denied by order of the Commission dated January 7, 1941, at which time it was announced that Petitioner would be permitted to file a brief amicus curiae.

13. Thereafter on January 27, 1941, Petitioner filed its Brief amicus curiae and, on February 20, 1941, Oral Argument was had before the Commission in which Petitioner was permitted to participate not as a party in interest but again as amicus curiae. On March 27, 1941, the Commission publicly announced that it had adopted the "Proposed Findings of Fact and Conclusions" made public on December 9, 1940, by a vote of three to two with two members not participating. On April 7, 1941, a formal Order to this effect was promulgated effective on the same day.

14. Petitioner alleges:

That the action of the Commission in changing the status of KOA from that of a Class I-A station to that of a Class I-B station and the granting of the application of Matheson Radio Company, Inc., will have immediate and far reaching results of a prejudicial nature, not only upon the Petitioner but upon the service available to all listeners throughout the United States who are dependent upon service from stations located within the United States,

That except within the Boston metropolitan area the operation of station WHDH at night with power of 5 kw as proposed will create such serious co-channel interfer-

775 ence between KOA and WHDH that neither station will be able to render a useful service throughout all that portion of the United States which, generally speaking, lies east of the Mississippi River.

That by amending Sub-sections (a) and (b) of Section 3.25 of its Rules and Regulations the Commission has re-

duced the area within which KOA is entitled to be free of co-channel interference from the entire area of the United States to that area within 720 miles of Denver, Colorado and,

That, taken together, the granting of the WHDH application and the amendment to the Commission's Rules and Regulations brings into operation paragraph B 8 (d) of Part II of the North American Regional Broadcasting Agreement which will operate to the prejudice of the priority rights of the United States on this channel.[4]

15. Petitioner further alleges that the Commission's action of April 7, 1941, was taken after a proceeding in which Petitioner was twice refused permission to intervene; under a Notice of Hearing which indicated clearly that modification of its Regulations would not be considered by the Commission; upon an ex parte record made before an Examiner which is barren of any evidence of the nature and extent of the service rendered by KOA, except such as the applicant saw fit to offer for its own purposes without cross-examination or rebuttal by National; upon a record which is likewise barren of any evidence of the nature and extent of
776 the service rendered by WHDH or to be rendered by WHDH; and that the entire proceeding furnishes no basis for determining the relative need for service of listeners in the Boston area as against those living in the area served by KOA.

Specifications of Error.

In entering its said Decision and Order of April 7, 1941, the Commission acted erroneously and beyond any power

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[4] Paragraph B 8 (d) of Part II of this treaty reads:

"(d) If within the period of this agreement the country to which a clear channel has been assigned shall have made use of the channel but not in the manner above prescribed or not to the extent required by the provisions of this agreement, such country shall be considered as having relinquished that portion of the rights which it has not used and at the expiration of this agreement the other countries party thereto shall have the right, if they see fit, to withdraw the unused privileges from such country and to reassign them to any or all of the other interested countries."

conferred upon it by the Communications Act of 1934 in each of the following particulars:

(1) The Commission erred in failing to return the WHDH application to the applicant without action as a defective application under Section 1.72 of its Rules.

(2) The Commission erred in denying the Petition to Intervene filed by National September 23, 1939.

(3) The Commission erred in denying the Motion to Dismiss the WHDH application filed by National September 29, 1939.

(4) The Commission erred in denying the Petition to Intervene filed by National December 16, 1940.

(5) The Commission's Decision and Order of April 7, 1941 is contrary to law for each of the following reasons:

(a) It results in a substantial modification of the license held by National authorizing it to operate radio station KOA without having afforded National an opportunity to be heard as required by Section 312 (b) of the Communications Act of 1934.

(b) It results in a change in the class and character of the frequency of radio station KOA without the consent of the licensee of said station and without affording said
777 licensee an opportunity to be heard as required by Section 303 (f) of the Communications Act of 1934.

(c) It results in a degradation of service on 830 kc (850 kc) which will be prejudicial to the priority rights of the United States on this channel under Paragraph B 8 (d) of Part II of the North American Regional Broadcasting Agreement without affording National an opportunity to be heard on its own behalf and on behalf of the listeners it serves.

(d) It results in a discrimination against service to rural listeners in order to furnish additional service to the residents of the City of Boston and as such is violative of the requirements of Section 307 (b) of the Communications Act of 1934.

(e) It effects a change in the policy of the Commission with respect to the use of the frequency 830 kc (850 kc) and authorizes and directs a new kind of use of said frequency after a hearing before an examiner contrary to Section 409(a) of the Communications Act of 1934.

(f) The Commission was without power to grant the WHDH application except after a hearing upon issues clearly defined and after affording National an opportunity to participate fully in such hearing.

(g) The Commission was without power to take any action upon the WHDH application except to return said application to the applicant as required by Section 1.72 of its Rules and Regulations.

(h) The Commission was without power under its Notice of hearing dated December 2, 1939, either to amend its Rules and Regulations fixing the status of the frequency 830 kc (850 kc) or to grant the WHDH application which was clearly in conflict with said Rules and Regulations.

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(i) The Commissioner was without power to grant the WHDH application except after a full hearing in which the burden of proof was upon the applicant to show that the granting of its application would make for a fair, efficient and equitable distribution of radio service and would in all respects serve the public interest, convenience, and necessity.

(6) The Decision and Order complained of is erroneous, arbitrary and capricious, in that it constitutes an attempt by the Commission while acting in its quasi-judicial capacity to ignore and retroactively to repeal its own pronouncements promulgated while acting in its legislative capacity.

(7) The Decision and Order complained of is arbitrary and capricious in that, despite applicant's express disavowal of such a purpose, it is predicated upon a proposal for a new kind of use of the frequency 830 kc (850 kc) concerning which National had no due and timely notice, upon which it was not heard prior to the issuance of said final Decision and Order.

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(8) The Decision and Order complained of is arbitrary and capricious in that it is predicated upon a proposal for the use of the frequency 830 kc (850 kc) advanced by the Commission subsequent to the issuance of its second Notice of Hearing which Notice clearly indicated that such a proposal would not be considered.

(9) The Decision and Order complained of was made without affording National the type and character of hearing required by the Communications Act of 1934.

779 (10) The Findings and Conclusions of the Commission are insufficient to support the Decision rendered and do not fairly report and represent the evidence in the record.

(11) The evidence is insufficient to support the Commission's Decision and Order in that it affords no basis for a comparison of the services rendered by radio stations WHDH and KOA.

(12) The evidence is insufficient to support the Commission's Decision and Order in that it fails to afford any basis for a determination of the relative scope, character and quality of the radio services available to the residents of Boston and the area adversely affected by the granting of the WHDH application.

(13) The Decision and Order complained of is illegal, void and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States in that it is based upon facts and issues concerning which National was denied a hearing at any stage of the proceedings.

Relief Requested.

Wherefore, Petitioner respectfully prays:

1. That the Commission reconsider its said action of April 7, 1941, and vacate its said Decision and Order amending Section 3.25 of its Rules and Regulations and granting the application of Matheson Radio Company, Inc., (WHDH) and,

2. That the Commission enter its Order denying said application upon the basis of the proceedings already had or,

3. That the Commission conduct such further proceedings with respect to said application as shall be consistent with its Rules and Regulations, to-wit:

780 (a) That said application be returned to the applicant as defective pursuant to the provisions of Section 1.72 of the Commission's Rules and Regulations.

(b) That applicant be instructed that if it desires a modification of Section 3.25 of the Commission's Rules and Regulations that it follow the procedure required by Section 1.71 of said Rules and Regulations.

(c) That if and when said application is designated for hearing by the Commission upon issues clearly defined Petitioner be permitted to appear and participate fully in the taking of evidence and in any other procedural steps relating to said application taken pursuant to the provisions of Section 1.231 of the Commission's Rules and Regulations.

Respectfully submitted,

NATIONAL BROADCASTING COMPANY, INC.,

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838 *Decision and Order on Petition for Rehearing*

By the Commission: (Commissioners Case and Craven voting "No"; Commissioner Wakefield not participating; Chairman Fly not present.)

This is a petition for rehearing filed April 25, 1941 by the National Broadcasting Company, Inc. (KOA), Denver, Colorado. It is directed against the Commission's action of April 7, 1941: (1) adopting as final the Proposed Findings of Fact and Conclusions made and entered by the

Commission December 5, 1940 in the matter of the application of Matheson Radio Company, Inc. (WHDH), Boston, Massachusetts, for construction permit (B1-P-2201—Docket No. 5453); (2) granting the application of Matheson Radio Company, Inc. (WHDH) for construction permit for increased power and nighttime operation; and (3) amending the rules and regulations of the Commission governing standard broadcast stations so as to strike the figure 850 from Subsection (a) of Section 3.25, and adding the figure 850 immediately following the figure 810 in Subsection (b) of Section 3.25.

I—History of Proceedings

On October 25, 1938, Matheson Radio Company, Inc. (WHDH), Boston, Massachusetts, was operating on the frequency 830 kc daytime and until sunset at Denver, Colorado, with the power of 1 kw. On that date, Matheson filed an application for construction permit requesting an increase in power to 5 kw, and in hours of operation to unlimited time, using a directional antenna at night. Petitioner, National Broadcasting Company, Inc. (KOA), Denver, Colorado, was then using the frequency 830 kc[1] unlimited time with power of 50 kw. Each of these assign-
839 ments was made in accordance with the Commission's then effective rules.[2]

[1] Under the provisions of the North American Regional Broadcasting Agreement stations which were on March 29, 1941, assigned to the frequency 830 kilocycles, were shifted to 850 kilocycles. Station KOA is now authorized to use 850 kc with 50 kw power, unlimited time.

[2] Insofar as these rules are here material, they were as follows:

"70. For the purposes of allocation of frequencies * * * broadcast stations are classified as follows: * * * a. Clear channel. * * *"

"72. The term 'clear channel station' means a station licensed to operate on a frequency designated as a clear channel. (See par. 116)"

"77. The term 'limited time station' means a station licensed to operate on a frequency designated as a clear channel, during daytime, and until local sunset, or until sunset at the dominant clear channel station, and in addition, during night hours, if any, not used by the dominant clear channel station."

"116. The following frequencies are designated as clear channels and are allocated for use by clear channel stations * * *. * * * 830 * * * kilocycles."

"117. The authorized power of a dominant clear channel station shall be not less than 5 kilowatts nor more than 50 kilowatts."

The foregoing rules were on August 1, 1939, superseded by sections 3.21(a), 3.22(a), 3.23(a) and (b), 3.24 and 3.25, of the Commission's present rules.

The Matheson application was in proper form and available for Commission consideration. Upon examination thereof, the Commission was unable to determine that a grant would serve public interest, convenience, and necessity. Accordingly, on January 3, 1939, the Commission designated the application for hearing.

Several petitions to intervene in the hearing were filed,[3] of which only one, filed by the petitioner, is material
840 to this proceeding. That petition was denied by the presiding Commissioner on September 29, 1939, on the basis of a written opinion entered the same day in Docket No. 5698, *In re Application of Hazelwood, Inc.*, Orlando, Florida.[4]

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[3] Rule 1.102 on Intervention is as follows:

"Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, *the facts on which the petitioner bases his claim that his intervention will be in the public interest*, and must be subscribed or verified in accordance wih Section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same." (Emphasis supplied).

[4] The Hazelwood decision stated in part:

"The underlying purpose of the Commission in adopting its present rule on intervention (1.102) was to correct a practice which had become prevalent under the prior rule of the Commission relating to intervention. Under its former rule, the Commission permitted any person to intervene in a hearing if his petition disclosed 'a substantial interest in the subject matter'. This standard was so broad and the Commission's practice under it was so loose that intervention in Commission hearings came to be almost a matter lying in the exclusive discretion of persons seeking to become parties to Commission proceedings. The experience of the Commission during the past few years clearly demonstrated that the participation of parties other than the applicant in broadcast proceedings in a great many cases resulted in unnecessarily long delays and expense to both the Commission and applicants without any compensating public benefit. In many cases the major function served by intervenors was to impede the progress of the hearing, increase the size of the record, confuse the issues and pile up costs to the applicant and to the Commission through the introduction of cumulative evidence, unnecessary cross examination, dilatory motions, requests for oral argument and other devices designed to prevent expeditious disposal of Commission business.

"The underlying purpose of the present rule is to limit participation in proceedings, particularly on broadcast application, to those persons whose participation will be of assistance to the Commission in carrying out its statutory functions. The present rule requires a petitioner to set forth not only his interest in the proceeding but also 'the facts on which

841 On October 10, 1939, the Commission en banc affirmed the action of the presiding Commissioner denying National's petition to intervene.

On December 2, 1939,[5] a notice was issued by the Commission announcing that the Matheson application would be heard upon certain issues therein stated. Insofar as these issues are here material they were:

"(1) To determine whether or not the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III), properly interpreted and applied, preclude the granting of the application[6];

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the petitioner bases his claim that his intervention will be in the public interest'. The fact that a proposed intervenor may have the right to contest in a court the validity of an order granting or denying a particular application does not in and of itself mean that such a person is entitled as a matter of right to be made a party to the proceedings before the Commission on such application. Intervention in proceedings before administrative agencies like the Federal Communication Commission is ordinarily covered by statutory provision. The Communications Act contains no provisions giving the right of intervention in proceedings before the Commission to any person or class of persons, but expressly provides that the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. By the adoption of Rule 1.102 the Commission in effect has declared that it will conduce to the proper dispatch of business and to the ends of justice if it permits intervention in a proceeding before it only if the making of a record in which the facts are fully and completely developed, is facilitated by permitting the requested intervention. It is this theory—that where the public will benefit through aid or assistance given to the Commission or the applicant by a party intervenor in a broadcast hearing, such participation should be permitted—which underlies Rule 1.102.

"The petition of the Orlando Broadcasting Company, Inc., utterly fails to meet the requirement of the present rule on intervention. Insofar as it requests permission to participate in the hearing already designated on the application of Hazelwood, Inc., it simply prays that the petitioner be made a party and be allowed to present 'evidence.' Not the slightest intimation is given as to the type of evidence which the petitioner desires to adduce or what petitioner intends to prove by the introduction of such evidence. * * *"

[5] The numerous motions and petitions filed in this proceeding delayed the issuance of this notice of hearing. Many of these motions and petitions are not here material and hence references to them have been omitted.

[6] Sections 3.22 and 3.25 of the Commission's Rules (Part III) are as follows:

"3.22 CLASSES AND POWER OF STANDARD BROADCAST STATIONS (a) *Class I station.*—A 'class I station' is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area free

842 "(2) To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with Stations KOA * * *"

On January 29, and 30, 1940, the hearing was held on the Matheson application before an examiner designated by the Commission. Proposed findings were filed by the applicant March 15, 1940. On December 5, 1940, Proposed Findings of Fact and Conclusions of the Commission (Case and Craven, Commissioners, dissenting) were made and entered proposing to grant the Matheson application and to amend subsections (a) and (b) of section 3.25 of the Commission's Rules by striking the reference to the frequency 830 (850) kc from subsection (a) of Section 3.25, and by adding the figure 830 (850) immediately following the figure 810 in subsection (b) of section 3.25.[7]

The Commission found, inter alia:

"6. * * * the issuance of an authorization as applied for by applicant would not be in accordance with Section 3.25 of its Rules. Section 3.25(a) of the Rules limits the use of the frequency 830 (850) kc to one full-time station of 50 kw power; the applicant proposes to operate its station nighttime simultaneously with the station already assigned to the frequency."

"7. * * * operation of Station WHDH nighttime, with directional antenna, as proposed by applicant, would not

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from interference except from stations on the adjacent channel, and from stations on the same channel, in accordance with the channel designation in section 3.25 or in accordance with the 'Engineering Standards of Allocation'. The operating power shall be not less than 10 kilowatts nor more than 50 kilowatts." (Also see Section 3.25 (a) for further power limitation).

"3.25 CLEAR CHANNELS; Classes I and II.—The frequencies in the following tabulation are designed as clear channels and assigned for use by the classes of stations as given:

(a) To each of the channels below there will be assigned one class I station and there may be assigned one or more class II stations operating limited time or daytime only: * * * 850 * * *. The power of the Class I stations on these channels shall not be less than 50 kilowatts.

(b) To each of the channels below there may be assigned class I and class II stations: * * *."

[7] See *infra* p. 17.

cause any interference to the primary service of Station KOA, Denver, Colorado, and * * * such interference as the proposed operation of WHDH might reasonably be expected to cause to reception of KOA would be limited to receivers in the eastern half of the United States. Any use which might be made of the signal of KOA in the
843 area where same might be affected by proposed operation of WHDH would be dependent upon the characteristics of the individual receiver, the signal intensity available, and signal to interference ratio involved in each individual case."

* * * *

"10. The granting of a permit therefor and operation of Station WHDH as proposed by applicant will enable it to deliver service of primary signal quality to an area having a population of 3,093,000 or 621,000 more people than are now included within the primary service area of the station. The hours of operation of applicant station will be extended two and one-half hours during summer months, and a maximum of five and one-half hours during winter months. This will provide a new primary service to 94.9% of the Boston metropolitan area, including a population of 2,185,000. In addition to the aforementioned improvements and extension of service to residents in the Boston area, there will be an improvement and extension of service which applicant station now endeavors to render over the fishing banks situated off the New England coast."

11. * * * with respect to the proposed use of the frequency 830 (850) nighttime at Boston simultaneously with the present use of the frequency at Denver, * * * such operation would permit more efficient use of the frequency * * *"

On December 16, 1940, petitioner filed a second petition to intervene " * * * in order that, as a party, it may: (1) renew its motion to dismiss the WHDH application,[*] (2)

[*] A previous motion filed by National to dismiss the Matheson application had been dismissed on December 6, 1939.

file a motion to reopen the proceedings in order to afford petitioner an opportunity to introduce evidence, to cross-examine all witnesses, and otherwise to participate fully in the proceedings, (3) * * * file proposed findings of fact and conclusions of law, (4) have the right to file exceptions to any proposed Commission decision thereafter issued, (5) request oral argument upon such proposed decision and upon its exceptions thereto, and (6) in all respects fully participate in the issues involved in the application of Matheson Radio Company, Inc." This petition, like National's previous petition to intervene did not comply with Section 1.102 of the Commission's Rules on intervention in that it did not state "the facts on which petitioner bases his claim that his intervention will be in the public interest." Nor was the petition in effect anything more than a premature petition for rehearing. Accordingly, the petition was denied on January 7, 1941, but National was granted permission to submit a brief as *amicus curiae*. The Berks Broadcasting Company (WEEU) (an intervenor whose participation in this proceeding is not here material), requested oral argument which was granted by the Commission, and National was permitted to participate in the oral argument as *amicus curiae*. The oral argument was had before the Commission February 20, 1941. On April 7, 1941, the Commission (Case and Craven Commissioners, dissenting), adopted as final the Proposed Findings of Fact and Conclusions of the Commission made and entered December 5, 1940, amended the Rules and Regulations Governing Standard Broadcast Stations, as aforesaid, and granted the application of Matheson Radio Company, Inc. (WHDH), for construction permit.

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On April 11, 1941, National filed a petition for stay of the foregoing action of the Commission April 7, 1941, (a) "until after the Commission shall have had an opportunity to take action upon a petition for rehearing which this petitioner intends to file on or before April 27, 1941" or (b) "until after the conclusion of any rehearing which

may be held subsequently should the Commission grant its petition for rehearing" or (c) "until after a final determination of proceedings which petitioner intends to institute in the United States Court of Appeals for the District of Columbia for judicial review of the Commission's action."

On April 22, 1941, the Commission denied the petition for stay on the ground that "the sole basis for the relief requested in the Petition for Stay is an allegation of 'great and irremediable damage' to the private rights of petitioner without any facts to support it and that, therefore, petitioner has failed to state a ground for Stay." On its own motion, however, the Commission suspended its action of April 7, 1941, "pending the filing by National Broadcasting Company, Inc. (KOA) * * * of a Petition for Rehearing and the determination thereon by the Commission, or until further order of the Commission", because it appeared "upon an independent examination of the facts and circumstances that public interest, convenience and necessity will be served" thereby.

On April 25, 1941, National filed a petition for rehearing directed against the action of the Commission April 7, 1941. On May 7, 1941, Matheson Radio Company, Inc. (WHDH) filed an opposition to the petition for rehearing.

II—Allegations of the Petition for Rehearing

The petition alleges thirteen grounds of error. Stripped of all repetition, these thirteen grounds boil down to the following allegations:

1. That the Commission erred in failing to return the Matheson application to the applicant without action as a "defective" application under section 1.72 of its Rules, and was without power to take any action upon this application except to return it.

2. That the Commission erred in refusing petitioner the right to intervene in the hearing on the Matheson application. Petitioner asserts that the Commission had no power under the Act to grant the Matheson application "except

after a hearing upon issues clearly defined and after affording National an opportunity to participate fully in such hearing."

845 3. That Section 303(f) of the Act requires the Commission to afford petitioner an opportunity to be heard prior to the amendment of Section 3.25 of the Rules.

4. That the grant of the Matheson application "results in a degradation of service on 830 kc. (850 kc) which will be prejudicial to the priority rights of the United States on this channel under Paragraph B 8(d) of Part II of the North American Regional Broadcasting Agreement without affording National an opportunity to be heard on its own behalf and on behalf of the listeners it serves."

5. That the grant of the Matheson application "results in a substantial modification of the license held by National authorizing it to operate Radio Station KOA", and Section 312(b) of the Communications Act of 1934 requires the Commission to afford KOA an opportunity to be heard prior to such a grant.

6. That the decision of the Commission effects a change in the policy of the Commission with respect to the use of the frequency 850 kilocycles and authorizes and directs a new kind of use of said frequency. It is alleged that the Commission was without power, under Section 409 of the Communications Act of 1934, to effect such a change after a hearing before an examiner.

7. That the findings and conclusions of the Commission are insufficient to support the decision rendered and do not fairly report and represent the evidence in the record; that the evidence is in sufficient to support the Commission's decision "in that it affords no basis for a comparison of the services rendered by Radio Stations WHDH and KOA" and "it fails to afford any basis for a determination of the relative scope, character and quality of the radio services available to the residents of Boston and the area adversely affected by the granting of the WHDH application."

8. That the decision is in violation of the requirements of Section 307(b) of the Communications Act of 1934 in that it results in a discrimination against service to rural listeners in order to furnish additional service to the residents of the City of Boston.

III—Discussion of the Allegations of the Petition

(1) We do not agree that the Commission was required to return the Matheson application without action as "defective" under our Rules, or that our Rules deprived us of the power to take any action upon this application except return it. Under the rules in effect when the Matheson application was filed, it was not "defective". The application was "in writing, under oath of the applicant, and on forms furnished by * * * the Commission";[9] two copies of the application were filed with the Commission at its
846 offices in Washington, D. C.;[10] the application was specific with regard to the frequency, power, hours of operation, and all other terms of the instrument of authorization requested;[11] and the applicant's answers to the questions set forth in the application forms were complete.[12] It was, therefore, available for consideration by the

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[9] "103.1 Each application for an instrument of authorization shall be made in writing, under oath of the applicant, and on forms furnished by or in the manner prescribed by the Commission: * * *"

[10] "103.7 Each application for construction permit * * * with respect to the number of copies and place of filing, shall be submitted as follows: * * * 2 copies direct to Washington, D. C."

[11] "103.9 Each application shall be specific with regard to frequency or frequencies, power, hours of operation and all other terms of the instrument of authorization requested. An application for broadcast facilities in the band 550 kc 1600 kc shall be limited to one specific frequency. * * *"

[12] "104.1 * * * Any application which is not filed in accordance with the Commission's regulations with respect to the form used, manner of execution and completeness of answer to questions therein required will not be considered by the Commission. Each such application shall be returned to the applicant by the Secretary of the Commission, together with a brief statement of the respect in which it is defective."

Rules 103.1, 103.7, 103.9 and 104.1 were superseded by section 4.01 and 4.02 of the Rules effective January 1, 1939 (see pp. 2830 and 2831, *Federal Register*) which in turn were superseded by sections 1.71 and 1.72 of the present rules of the Commission adopted August 1, 1939, as amended December 20, 1940.

Commission under Section 308 of the Communications Act of 1934.

The fact that the Matheson application was still pending and without final action by the Commission when Sec. 1.72[13] was promulgated and made effective did not require
847 the return of the application unconsidered. We think the determination as to whether we should have returned the application, which was proper when filed, required further data or information, acted upon the application as filed, or taken any other action with respect to it, was a matter committed solely to our discretion by Section 4(j) of the Communications Act which empowers us to conduct our proceedings in such a manner as "will best conduce to the proper dispatch of business and to the ends of justice." See also *Federal Communications Commission* v. *The Pottsville Broadcasting Company*, 309 U. S. 134. The petition does not show wherein our discretion was exercised either arbitrarily or capriciously.

(2) Petitioner's contention that the Commission had no power to grant the Matheson application, or to amend Sec. 3.25 without first affording petitioner notice and an opportunity to be heard, and that petitioner was entitled to intervene in the proceedings on the Matheson application is plainly without merit, we think, when examined in the light of our action thereon, and the applicable provisions of the Communications Act of 1934.

Insofar as the Commission's grant of the Matheson application is concerned, Section 309(a) of the Act requires that the Commission grant applications without hearing if upon examination thereof it "shall determine that public

[13] Section 1.72 is as follows:

"Defective applications.—(a) Applications which are defective with respect to completeness of answers to required questions, execution, or other matters of a purely formal character will not be received for filing by the Commission unless the Commission shall otherwise direct.

(b) Applications which have been received for filing but which are not in accordance with the Commission's rules, regulations or other requirements will be considered defective. If an applicant by specific request of the Commission is required to file any documents or information not included in the prescribed application form, a failure to comply therewith will constitute a defect in the application. Such defective applications will not be considered by the Commission."

interest, convenience or necessity would be served by the granting thereof." In the event the Commission upon examination of any such application does not reach such decision with respect thereto, this Section requires that the Commission "shall notify the *applicant* thereof, fix and give notice of a time and place of hearing thereon, and shall afford *such applicant* an opportunity to be heard under such rules and regulations as it may prescribe" (Emphasis supplied). No such right to notice and hearing was conferred upon any person *other than the applicant*, and no duty rests upon the Commission to afford any person *other than the applicant*, an opportunity to be heard.

As we pointed out in our decision in the *Hazelwood* matter,[14] the Act contains no provision giving the right of intervention in proceedings to any person or class of persons, but expressly provides that the Commission may "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." We promulgated Rule 1.102 relating to intervention pursuant to this authority. National's petition, like the petition in the *Hazelwood* case, previously referred to, failed to meet the requirements of this rule, since it did not set forth "the facts on which the petitioner bases his claim that his intervention will be in the public interest." Petitioner did not even allege that it had any evidence to introduce, much less state the type of evidence which the petitioner desired to adduce, or what petitioner intended to prove by participating in the hearing.

Petitioner asserts that its license "entitled" it to operate Station KOA free of co-channel interference, and
848 that the grant of the Matheson application results in reducing the area in which Station KOA is now "entitled" to render service free of co-channel interference. It is further alleged that the grant of the Matheson application results in changing the "character" of the fre-

[14] See note 4, page 3.

quency 850 kc.[15] Therefore, argues petitioner, the grant of the Matheson application constitutes a modification of its license. But, assuming that interference will result to petitioner's station,[16] nothing in the Communications Act of 1934, the rules of the Commission promulgated pursuant thereto, or petitioner's license, entitles petitioner to operate Station KOA free of co-channel interference, nor to operate in any manner other than appears specifically on the face of petitioner's license.[17] This license merely authorizes petitioner to operate specified transmitting equipment for a period of one year, on the frequency 850 kc. with a power of 50 kw, and for unlimited time. It does not expressly or by implication give petitioner a right to serve any particular number of listeners or geographical area or contain any provision designating petitioner's station as a "Class I-A" station.

Although the Commission under Section 303(h) of the Act has been given express authority to "establish areas or zones to be served by any station", it has not done so for standard broadcast stations.[18] Such a provision would not be practicable in the present state of the broadcasting art because all stations using the same frequency, with the same power and operating during the same hours, will not cover like areas or population. The extent of the service derived from the use of frequencies in the band assigned for standard broadcast stations is subject to wide varia-

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[15] I. e., before the grant and change in Rule 3.25 accompanying it, the frequency 850 kc was a "Class I-A" frequency, whereas, as a result of the Commission's Order, the frequency 850 kc has become a "Class I-B" frequency.

[16] See p. 18 *infra*.

[17] Section 301 of the Communications Act of 1934 provides in part: "* * * and no license shall be construed to create any right beyond the terms, conditions, and periods of the license. * * *"

[18] Licenses for High Frequency Broadcast Stations provide for specified service areas in square miles. This is possible in the allocation of High Frequency Broadcast Stations, although it is not possible in the allocation of Standard Broadcast Stations, primarily for the following reasons: (a) The propagation of high frequency signals is subject to fewer variables than is the propagation of standard broadcast signals; (b) unlike Standard Broadcast Stations, High Frequency Broadcast stations render no useful sky-wave service; (c) unlike Standard Broadcast Stations, the sky-wave transmissions from a High Frequency Broadcast Station do not restrict or limit the service area of another High Frequency Broadcast Station.

tions dependent upon skywave propagation conditions, conductivity of the terrain, frequency, efficiency of the particular radiating system employed, static, man-made noises and other factors. A station in one part of the United States may serve more or less population and area than a station in another part of the United States, using the same frequency and power, and operating during the same hours of operation. Moreover, the present allocation of
849 standard broadcast stations is such that as a practical matter each time an application for construction permit, license or modification of license is granted, there is likely to be some change in the population and area of other stations. The Commission, therefore, has not established areas or zones to be served by standard broadcast stations, but instead has provided Standards for normally protected sky-wave and ground-wave contours of stations classified by its Rules. Neither the Standards nor the Rules, however, impart any "rights" to the licensee, but are for administrative convenience of the Commission in the allocation of facilities under the Act.[19] Thus, the grant of an application which, because of electrical interference, may result in curtailment of the population or area served by an existing station, does not "modify" the existing station's license. Any other interpretation would render nugatory Section 309(a) of the Act in so far as that section provides for the grant of applications without hearing, if public interest, convenience, and necessity will be served thereby, because, as a practical matter, virtually no application could be granted without a hearing. The interpretation contended for by petitioner would thus make expeditious and orderly administration of the Communications Act impossible.

Since petitioner has no legal right to be heard in any event, and did not comply with the Commission's rule pro-

[19] See Proposed Finding of Facts and Conclusions, In re: *Application of WREN Broadcasting Company, Inc. (WREN)*, Lawrence, Kansas, Docket No. 5491—June 19, 1940, and Decision and Order, In re: *Beaumont Broadcasting Corporation (KFDM)*, Beaumont, Texas, February 11, 1941 (B3-ML-927). See also footnote 1, page 48—6th Annual Report of F. C. C.

viding for intervention, we think the contention that the Commission erred in not permitting petitioner to intervene is without merit.

We note, too, that our refusal to permit petitioner to intervene did not preclude petitioner if it had so desired from appearing at the hearing on the Matheson application and giving any relevant, material, and competent testimony it may have had. The rules of the Commission expressly so provide.[20] Petitioner did appear at the hearing, but limited its participation solely to noting an exception to the ruling of the Commission denying its petition to intervene. If petitioner had any relevant, material and competent testimony relating to the merits of the Matheson application, it had ample opportunity to present the same. Petitioner can hardly complain now that the record on the Matheson application is deficient because of its own failure to give the Commission the benefit of such information and data as it may have had.

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(3) Petitioner contends that it was error for the Commission to amend Section 3.25 without first affording petitioner notice and an opportunity to be heard thereon and relies on Section 303(f) of the Act which empowers the Commission to:

"* * * Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of the Act: *Provided however*, That changes in the *frequency, authorized*

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[20] Sec. 1.195 of the Rules of the Commission provides in part:

"The will be maintained in the office of the secretary of the Commission a record of all communications received by the Commission relating to the merits of any application pending before the Commission requesting the granting, renewal, modification or revocation of any license or construction permit * * *. Such record shall show the name and address of the person making the statement and the substance of such statement. When the date of hearing has been set, if the matter is designated for hearing, the secretary shall notify all persons shown by the records to have communicated with the Commission regarding the merits of such matter in order that such persons will have an opportunity to appear and give evidence at such hearing; * * *.

"No such person shall be precluded from giving any relevant, material and competent testimony at such hearing because he lacks a sufficient interest to justify his intervention as a party in the matter. * * *".

power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with; * * *" (emphasis supplied).

Neither the amendment to Sec. 3.25 nor the grant of the Matheson application, however, effected a change in the frequency, authorized power, or in the time of operation of petitioner's station KQA. The hours of operation of Station WHDH were changed (increased), but that station expressly requested this change in its application and hence consented thereto. It is clear, therefore, that our action of April 7, 1941, amending Sec. 3.25 did not violate Section 303(f) of the Act.

(4) Petitioner contends that the Commission's action "will be prejudicial to the priority rights of the United States" under paragraph B 8 (d) of Part II of the North American Regional Broadcasting Agreement[21] and
851 could not be taken without affording National an opportunity to be heard. This contention is based upon petitioner's misconception that it is in some manner subrogated to the rights of the United States under the Treaty. But the Treaty recognizes rights only in the signatory governments and does not create in any licensee any vested rights in frequencies or service areas. Moreover, the Treaty does not prohibit the Commission from considering applications for broadcast facilities in accordance

[21] Paragraph B 8 (d) of Part II of this Treaty is as follows:

"If within the period of this agreement the country to which a clear channel has been assigned shall have made use of the channel but not in the manner above prescribed or not to the extent required by the provisions of this agreement, such country shall be considered as having relinquished that portion of the rights which it has not used and at the expiration of this agreement the other countries party thereto shall have the right, if they see fit, to withdraw the unused privileges from such country and to reassign them to any or all of the other interested countries."

with the statutory standard of public interest, convenience and necessity.

Nothing in the North American Regional Broadcasting Agreement gives petitioner any right to be heard prior to the promulgation of the amendment of Section 3.25, and, as we have already pointed out, nothing in the Communications Act of 1934 or in the terms of its license issued pursuant to the Act, gives petitioner any such right.

(5) In so far as petitioner contends that the Commission's Order of April 7, 1941 results in a "substantial modification" of petitioner's license without an opportunity to be heard as required by Section 312(b)[22] of the Communications Act of 1934, we think petitioner misconstrues the Commission's Order. As we have already pointed out in our discussion of point 2, petitioner's license authorizes Station KOA to operate for a period of one year on the frequency 850 kilocycles with a power output of 50 kw and unlimited hours. The instant Order does not change any of the terms of petitioner's existing license. We think, therefore, this contention is without merit.

852 (6) Petitioner's contention that the Commission's Order of April 7, 1941, "effects a change in the policy of the Commission with respect to the use of the frequency 850 kilocycles, and authorizes a new kind of use of said frequency", and that this change was made after hearing before an examiner and is therefore contrary to

[22] Section 312(b) of the Communications Act of 1934 is as follows:

"Any station license after June 19, 1934, granted under the provisions of this chapter or the construction permit required hereby and after such date issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue. (June 19, 1934, c. 652, Sec. 312, 48 Stat. 1086)"

Section 409(a)[23] of the Communications Act of 1934 further misconstrues the Commission's Order.

In considering whether the Commission's Order amending Section 3.25 actually effects a change in the policy of the Commission, it will be helpful to review briefly the history of the allocation of radio broadcast frequencies in the United States.

The Radio Act of 1927 became law February 23, 1927. Its passage was precipitated by the so-called "break down of the law" which followed an opinion of the Attorney General, July 6, 1926, holding that the Secretary of Commerce under existing law had no power to restrict the operation of stations with respect to frequency, power, or hours of operation. Broadcast stations in the United States took advantage of this situation to broadcast on whatever frequencies they pleased with whatever power they desired and whenever they chose. The result was utter chaos for the listening public. In its attempt to bring about order, the Federal Radio Commission undertook at once to put into effect a general reallocation. This reallocation was not based upon any scientific plan and in the late months of 1927 it became apparent that the reallocation was not giving satisfactory results. As a partial step in ameliorating the situation, the Commission, on December 1, 1927, ordered 25 channels cleared, either entirely or partially.[24]

In the meantime, the Commission continued its endeavor to work out an allocation policy for broadcast stations. It invited and received the best engineering advice in the country. As a result of this advice, the Commission, on August 30, 1928, promulgated General Order 40[25] as the

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[23] That part of Section 409(a) of the Communications Act of 1934 which is here material provides: "any member or examiner of the Commission * * * when duly designated by the Commission for such purpose, may hold hearings * * *; except that in the administration of Part III of this Act, an examiner may not be authorized to exercise such powers with respect to a matter involving (1) a change of policy by the Commission * * * or (4) a new kind of use of frequencies * * *."

[24] See p. 9, Second Annual Report of Federal Radio Commission.

[25] See Second Annual Report of Federal Radio Commission, page 48.

first step toward putting into effect a new allocation system. This Order established three types of channels for service by radio broadcast stations in the United States as follows: Clear channels—for use by stations to provide good service to rural and remote listeners; regional channels—
853 for use by stations to provide service primarily to metropolitan districts and rural areas contiguous thereto; and local channels—for use by stations to provide service primarily to cities or towns and suburban or rural areas contiguous thereto.[26]

During the period from 1928 to 1933, the Federal Radio Commission made no change "in the basic plan of allocation of frequencies set up by General Order 40" but minor changes in frequency assignments were made from time to time in order to improve local conditions.[27] During the period from 1934 to 1939 inclusive, no change in the basic plan of allocation set up by General Order 40 was made by the Federal Communications Commission, but individual assignments and changes were made as a result of the granting of applications.[28] Thus, it is apparent from the administrative practice heretofore followed that mere changes in frequencies have never been regarded as "changes in policy" of the Commission.

On June 23, 1939, the Commission, after an extensive hearing, adopted new rules and regulations governing standard broadcast stations and Standards of Good En-

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[26] The following statement was issued by the Federal Radio Commission together with General Order 40: "The Commission is furthermore convinced that within the band of frequencies devoted to broadcasting, public interest, convenience, or necessity will best be served by a fair distribution of different types of service. *Without attempting to determine how many channels should be devoted to the various types of service,* the Commission feels that a certain number should be devoted to stations so equipped and financed as to permit the giving of a high order of service over as large a territory as possible * * * a certain number of other channels should be given over to stations * * * as to which there will be large intermediate areas in which there will be objectionable interference. Finally, there should be a provision for stations which are distinctly local in character and which aim to serve only the smaller towns in the United States * * *." (Second Annual Report of Federal Radio Commission, page 168.) (Emphasis supplied.)

[27] See 3rd, 4th, 5th, 6th, and 7th Annual Reports of the Federal Radio Commission, pages 16, 56, 19, 25 and 18 respectively.

[28] See 1st, 2nd, 3rd, and 4th Annual Reports of the Federal Communications, pages 23, 57, 28, and 51 respectively.

gineering Practice concerning standard broadcast stations effective August 1, 1939. These rules did not affect the basic plan of allocation of broadcast facilities, but sought to unify the plan of allocation of broadcast stations within the United States with that set up by the North American Regional Broadcasting Agreement. As under former rules, the three classes of channels provided were clear, regional and local. The principal changes were these: The new definitions establishing these classes of channels clarified the purpose of each class of channel and in general established the normal protection for stations operating
854 on these channels.[29] With respect to clear channels, these rules provided in part:

"3.25. Clear Channels: Classes I and II—The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations as given:

(a) To each of the channels below there will be assigned one Class I station and there may be assigned one or more Class II stations operating limited time or daytime only: • • • 850 • • • kilocycles.

(b) To each of the channels below there may be assigned Class I and Class II stations: • • •."

The Order of the Commission, April 7, 1941, amended Rule 3.25, in part, as follows:

"3.25. Clear Channels; Classes I and II—The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations as given:

(a) To each of the channels below there will be assigned one Class I station and there may be assigned one or more Class II stations operating limited time or daytime only: • • •

(b) To each of the channels below there may be assigned Class I and Class II stations • • • 850 • • • kilocycles."

It is clear from the foregoing that the amendment with respect to the single frequency 850 does not change, but on

[29] See Page 38, Fifth Annual Report, Federal Communications Commission.

the contrary continues the policy maintained by the Commission prior to April 7, 1941, of providing two classes of clear channel service. Both classes of clear channel stations are "designed to render primary and secondary service over an extended area and at relatively long distances."[39] The amendment merely affects a minor shift in one frequency within the established policy.

Petitioner's contention that the Commission's action results in a "new use" of the frequency 850 kilocycles within the meaning of Section 409 (a) of the Communications Act is similarly without merit. The frequency continues to be assigned for the same kind of service, i. e., standard broadcast. Furthermore, as we have already shown, no change will result in the real nature or purpose of the use of this frequency within the standard broadcast band.

855. (7) Petitioner alleges that the findings and conclusions of the Commission are "insufficient to support the decision rendered and do not fairly report or represent the evidence." The petition does not, however, allege in what particulars these findings and conclusions are insufficient or fail to report and represent the evidence. In this respect, the petition does not comply with Section 1.271 of our Rules of Practice and Procedure which provides that a petition for rehearing "shall state with particularity in what respect the decision, order, or requirement, or any matter determined therein is claimed to be unjust, unwarranted or erroneous, and with respect to any finding of fact must specify the pages of the record relied on."

However, in view of the importance of the matters involved in this proceeding, we shall re-examine our findings and conclusions and the record upon which they are based. Since these findings and conclusions are stated at length elsewhere in this decision, we shall state simply their substance here. Summarized, we found that a grant of that application would not result in interference to the primary service of Station KOA, Denver, Colorado, and that such

[39] See Section 3.22 of the Rules of the Commission.

interference to the reception of Station KOA as might reasonably be expected to result from a grant of the Matheson application would occur in its secondary service area and would be limited to receivers in the eastern half of the United States, remote from the KOA transmitter; that such secondary service as KOA could render in this area would be of uncertain character because of its dependence upon the characteristics of the individual receiver, the signal intensity and the signal to interference ratio involved in each individual case. These findings are supported by the expert opinion of both the applicant's and the Commission's engineer. We found further, that a grant of the Matheson application would enable Station WHDH to render an improved and extended primary service in the Boston metropolitan area and to the fishing banks situated off the New England coast; that the operation of Station WHDH as proposed would permit a more efficient use of the frequency 850 kilocycles than at present. Our review of the record indicates that the evidence supports these findings.

Petitioner further alleges that the evidence is insufficient to support the Commission's decision and order in that "it affords no basis for a comparison of the service rendered by Stations WHDH and KOA" and that "it fails to afford any basis for the determination of the relative scope, character and quality of the radio services available to the residents of the Boston metropolitan area adversely affected by the granting of the WHDH application." Since the record supports a finding that the primary service area of Station KOA will not be interfered with in any way and that the secondary service area of Station KOA would be limited to receivers in the eastern half of the United States and remote from the KOA transmitter where the KOA signal is of uncertain character, it is clear that the WHDH service does not displace the KOA secondary service in any real or substantial sense. It is significant that although petitioner contends it is entitled to serve the rural
856 areas in which it is claimed interference will occur,

it fails to allege either that it has been providing a useful service in such areas or point out, in terms of population, the nature and extent of the claimed interference. Accordingly, there is no occasion for making a comparison of the services rendered by Stations WHDH and KOA.

(8) Petitioner alleges that the Decision and Order herein "results in a discrimination against service to rural residents in order to furnish additional service to the residents of the city of Boston and, as such, is violative of the requirements of Section 307(b) of the Communications Act of 1934." As we have already indicated, our decision and order results in no real or substantial displacement of the service of KOA. We have found that the improvement and extension of service in the Boston area will serve public interest. We think, therefore, that this allegation is without merit.

Accordingly, it is ordered, this 20th day of May, 1941, that the petition for rehearing filed by National Broadcasting Company, Inc. (KOA) be, and it is hereby, denied.

It is further ordered that our Order of April 7, 1941 which was suspended on our own motion April 22, 1941 be, and it is hereby, reinstated.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

* * * * * * * * * * *

857 *Petition For Stay During Appeal*

National Broadcasting Company, Inc., as licensee of station KOA at Denver, Colorado, gives notice of its intention to appeal to the Court of Appeals for the District of Columbia from the Order of the Commission in the above entitled matter dated April 7, 1941, with respect to which its Petition for Rehearing was denied by the Commission on May 20, 1941.

Pending the final determination of such appeal Petitioner respectfully requests the Commission to stay the

amendment of sub-sections (a) and (b) of section 325 of its Rules and to stay the issuance of a construction permit to Matheson Radio Company, Inc., under such Order of April 7, 1941.

In support of its request, petitioner incorporates by reference in this Petition the representations and averments of its Petition for Rehearing dated April 25, 1941 as though fully set forth herein. In further support of its requests Petitioner urges the Commission to grant the same for the same reasons which impelled it upon its own motion to find, on April 22, 1941, that public interest, convenience and necessity would be served by suspending its order of April 7, 1941, pending the filing of Petitioner's Petition for Rehearing and the Commission decision thereon.

Respectfully submitted,

NATIONAL BROADCASTING COMPANY, INC.,

D. M. PATRICK
PHILIP J. HENNESSEY JR.
A. L. ASHBY
HENRY LADNER
Its Attorneys
810 Colorado Building
Washington, D. C.
May 21, 1941

* * * * * * * * * *

871 *Decision and Order on Petition For Stay During Appeal*

By the Commission: (Case and Wakefield, Commissioners, dissenting; Payne and Craven, Commissioners, absent.)

This is a Petition for Stay During Appeal filed by National Broadcasting Company, Inc., licensee of Station KOA, Denver, Colorado. Petitioner alleges that it intends to appeal to the Court of Appeals for the District of Columbia from the Commission's order of April 7, 1941. That order adopted as final the Proposed Findings of Fact and

Conclusions of the Commission proposing to grant the application of WHDH for unlimited hours of operation on 850 kc, with power of 5 kw, and also amended Section 325 of the Rules by removing the frequency 850 kc from the group of frequencies specified in Section 325 (a) and placing it in Section 325 (b).

On April 11, 1941 petitioner filed with the Commission a Petition for Stay pending action by the Commission on the Petition for Rehearing which petitioner alleged it was about to file or until after disposition of the appeal which petitioner alleged it would file if its Petition for Rehearing were denied. The only reason given in support of the petition was that the issuance of a stay would preserve the status quo whereas if a stay were not issued "KOA's status under the Rules and Regulations of the Commission and under the North American Regional Broadcast Agreement as well as its capacity to serve its listeners will be changed materially to its great and irremediable damage without its having been afforded an opportunity to be heard as a party to such action." No facts were alleged showing irremediable injury to petitioner or any injury to the public. Accordingly, the Commission on April 22, 1941 denied the Petition for Stay but on its own motion suspended its action of April 7, 1941 until after the filing of and action upon the Petition for Rehearing.

872 The Petition for Rehearing was filed on April 25, 1941 and was denied in a written Opinion and Order dated May 20, 1941. The present Petition for Stay was filed on May 21, 1941 and an Opposition thereto was filed by Matheson Radio Company, Inc. on May 28, 1941.

In the instant Petition for Stay, petitioner likewise requests that pending the determination of the appeal, the Commission stay the amendment of sub-sections (a) and (b) of Section 325 of its Rules and Regulations and the issuance of a construction permit to WHDH under its order of April 7, 1941. In support of its request, petitioner incorporates by reference the representations and averments contained in its Petition for Rehearing. These were dis-

cussed by the Commission and found to be without merit in its Opinion of May 20, 1941.

Petitioner apparently assumes that petitions for stay issue automatically, for in neither of the Petitions for Stay nor in the Petition for Rehearing are there any facts which show irremediable injury to itself or the public if the action of April 7, 1941 is not stayed. Such an assumption flies in the teeth of Section 405 of the Communications Act which provides that no request for rehearing shall "operate in any manner to stay or postpone the enforcement thereof, (i. e. an order of the Commission) without the special order of the Commission." When this section is considered in the light of the general policy of the Act to provide for the fullest utilization of radio frequencies in the public interest, it is clear that there must be a compelling reason for delaying the effective date of new or additional service.

Petitioner's repeated failures to show how the public will be injured unless the Commission's action is stayed is significant in view of the fact that the Commission found that the grant of the WHDH application would without measurably affecting petitioner's service enable WHDH to serve 621,000 more people within its primary service area, would improve and extend the service rendered by WHDH to the fishing banks off the New England coast, and would permit WHDH to operate approximately 2½ hours more in the summer and about 5½ hours more in the winter than at present. These findings have never been challenged by petitioner nor has it shown wherein public interest would be served by a further delay in the effectuation of this increased service. We find that public interest would be served by going forward without further delay with the extension and improvement of radio broadcast service to the listening public as proposed in the Matheson application.

In further support of its request for a stay, petitioner urges the Commission to grant it "for the same reasons which impelled it upon its own motion to find, on April 22, 1941, that public interest, convenience and necessity would

be served by suspending its order of April 7, 1941, pending the filing of Petitioner's Petition for Rehearing and
873 the Commission decision thereon." The issuance of a stay on the Commission's own motion was motivated by a desire on the part of the Commission to withhold final action on such an important matter until after petitioner had fully exercised its administrative opportunities to show wherein public interest, convenience or necessity would not be served by a grant of the Matheson application. Although, as we have heretofore indicated, petitioner's previous petition for stay suggested no reason why the public would be benefitted by a stay, the importance of the questions involved combined with the possibility that petitioner might make such a showing in its petition for rehearing appeared to justify a stay pending the filing of, and decision on, such petition. Petitioner failed to make such a showing as the Commission pointed out in its decision of May 20, 1941, on the Petition for Rehearing.

The considerations, therefore, which impelled the Commission to act on its own motion are no longer applicable. The Commission has determined to re-affirm its decision granting the WHDH application and amending Section 3.25 of its Rules and Regulations. Petitioner has not shown either wherein that determination is in error or why public interest would be served by a further stay of the Commission's action. On the contrary, the Commission has found that it would be against the public interest to order a further stay of its action which makes possible an extensive increase in WHDH's coverage without any measurable effect on that of petitioner's station.

Accordingly, it is ordered this 12th day of June, 1941 that the Petition for Stay During Appeal filed by National Broadcasting Company, Inc. (KOA) be and it is hereby, denied.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

874 Fly, Chairman, specially concurring:

For the reasons stated above and particularly since there is no real injury to Station KOA, and since Station WHDH moves forward with knowledge of any legal risks involved, I concur in the foregoing decision denying the stay. The Commission heretofore has arrived at a final decision upon the merits of this case, in which I did not participate, and I do not want by expressing any opinion on a procedural matter to be understood as expressing an opinion on the merits of the decision. At the same time I entertain no doubt as to its legality.

Great waste results from the fact that clear channel stations whose *raison d'etre* is to serve over great distances and in vast rural areas of the country, have to a great extent been concentrated along the coasts and the borders of the country. The power is impacted into the lucrative markets of large metropolitan areas which are already fully served, if, in fact, not over served, while a great portion of the signal strength of the clear channel station is wasted upon the sea. Thus, while listeners in New York, Chicago and Los Angeles may tune in on a dozen stations, there are vast rural regions in upper New England, in some areas of the South, and in the great trans-Mississippi area where the listening public has difficulty in receiving programs of even one station. The need for a studious, careful appraisal of this vital problem is apparent. If the clear channel wave lengths are to be further exploited, the plans for that exploitation ought to be made in the light of these dominant factors and as a result of a full study.

PROOF OF SERVICE.

Service of the foregoing Brief and Appendix for Appellant and receipt of a true and correct copy is hereby acknowledged this 15th day of September, 1941.

FEDERAL COMMUNICATIONS COMMISSION

By.....

.....

Attorney for Matheson Radio Company, Inc., Intervenor.

.....

Attorney for Berks Broadcasting Company, Intervenor.

IN

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 7933

NATIONAL BROADCASTING COMPANY, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Intervenor-Appellee

and

MATHESON RADIO COMPANY, INC.;
BERKS BROADCASTING COMPANY,
Intervenors

Appeal from the Federal Communications Commission

APPENDIX TO BRIEF FOR INTERVENOR.

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13 *Notice of Intention to Intervene*

Comes now Matheson Radio Company, Inc., a corporation organized and existing under the laws of the State of Massachusetts, and, pursuant to Section 402(d) of the Communications Act of 1934, gives notice of its intention to intervene in the above-entitled proceeding, with the view of urg-

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ing dismissal of the appeal, or affirmance of the decision of the Commission and otherwise to participate fully therein.

Statement of Intervener's Interest

Intervener, Matheson Radio Company, Inc., is interested in the above-entitled proceeding and it would be aggrieved and its interest adversely affected by a reversal of the Federal Communications Commission's decision appealed from herein for the following reasons:

1. Intervener, by the Commission's decision of April 7, 1941, was granted a construction permit authorizing a change in facilities from 1 kilowatt power and hours of operation to sunset in Denver on the frequency 850 kilocycles to operation with 5 kilowatts power, unlimited time, on the frequency 850 kilocycles.

2. A reversal of said decision of the Commission, as requested by the appellant, National Broadcasting Company, Inc., would deprive intervener of the increased operating facilities aforesaid with consequent impairment of the service to the public so authorized, would subject intervener to great losses because of the expense incurred in prosecuting its application before the Commission, would deprive intervener of the advertising revenue resulting from
14 such operation, and would deprive intervener of the privilege and opportunity of engaging in radio broadcasting as authorized by its permit.

MATHESON RADIO CORPORATION, INC.,

By ANDREW G. HALEY
1101 Earle Building
Washington, D. C.

W. THEODORE PIERSON
204 Munsey Building
Washington, D. C.

Its Attorneys

FCC Form No. 304
(Revised August 28, 1940)

RECEIVED
OCT 23 11 2 39

Exhibit A
to Form No. 304

Resubmitted

File No. B1-P-2201

Call letters WHDH

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

APPLICATION FOR REGULAR BROADCAST STATION CONSTRUCTION PERMIT OR MODIFICATION THEREOF

(Submit, in duplicate, to Federal Communications Commission, Washington, D. C. Swear to one copy)

See rules governing the service in which authorization is sought before executing application

To the Federal Communications Commission:

1. Name of applicant * Matheson Radio Co., Inc.
2. Post-office address: State Massachusetts City Boston
   Street and number 62 Boylston Street
3. Is this application made for—
   (a) Authorization to construct new radio station? No
   (b) Authorization to change present location of transmitter of existing station? No
      (1) What is distance in miles between present location and proposed location of transmitter? -
   (c) Authorization to change maximum rated carrier power, which necessitates installation of new equipment? Yes
      (1) Applicant represents that present maximum rated carrier power is 1,000 watts.
      (2) Applicant represents that proposed maximum rated carrier power is 5,000 watts.
   (d) Authorization to install new equipment? Yes
      (1) Indicate what new equipment is to be installed (check):
         (a) New transmitter Yes (b) Change in system of modulation No
         (c) Change in type or number of vacuum tubes in last radio stage Yes
         (d) Other changes (specify): Directional antenna
4. What is applicant's principal business? Radio broadcasting
   (a) What other business or businesses is applicant directly or indirectly interested in; explain fully? None

   (b) If applicant is a corporation, give the names and addresses of the officers, directors, and principal stockholders and state specifically what other business or businesses each of these parties is directly or indirectly interested in; explain fully? (Attach additional sheets if necessary.) John J. Matheson, President, 282 Washington St., Gloucester, Mass. Ralph G. Matheson, Treasurer, 75 Greaton Rd., West Roxbury, Mass. Martin Hanley, 225 Corey St., West Roxbury, Mass.

   (2) The number of members
   (3) Whether any members are aliens
   (4) The name, nationality, and position of each alien

12. (a) Is applicant directly or indirectly, through stock ownership, contract, or otherwise, interested in the ownership or control of any other radio broadcasting stations? No
    If so, state call letters and location of such stations
    (b) Has the applicant in the past been directly or indirectly interested in the ownership or control of any radio broadcasting stations? Yes
    If so, state call letters and location of such stations WEPS transferred by voluntary assignment of license to Worcester, Mass.
13. (a) State applicant's relation to station (whether applicant is to be owner or lessee, and, if neither owner nor lessee, state nature of applicant's interest in use and control of station) Owner
    (If not owner, a copy of agreement showing applicant's interest in station must be attached if not heretofore filed with the Commission)
    (b) If applicant is not to be owner of station, who is?
    (c) Will applicant have absolute control of station, both as to physical operation and program broadcast? Yes
    If not, attach copy of any contract which may in any way affect applicant's right to do so.
14. Attach detailed financial statement showing applicant's assets and liabilities and state fully the facts showing applicant's financial responsibility with respect to the construction and operation of station. Exhibit A, hereto attached.
15. (a) Has the applicant been finally adjudged guilty by any Federal court of unlawful monopolizing, or attempting unlawfully to monopolize, radio communication directly or indirectly through control of manufacture or sale of radio apparatus, exclusive traffic arrangements, or any other means, or of unfair methods of competition? No
    (b) Is applicant directly or indirectly controlled by any party finally adjudged guilty as above stated? No
    (Answer yes or no)
16. The frequency, power, and hours of operation requested for the proposed station are as follows:
    (a) Frequency 850 kilocycles.
    (b) Power (night) 5,000 watts. (c) Power (day) 5,000 watts.
    (d) Hours of operation:
       (1) Unlimited Yes (2) Daytime only (3) Limited
       (4) Sharing with (specify stations) None
       (5) Other (specify) None
    (e) State number of hours per day proposed station will operate 18 hours

16-941

See rules governing the service in which authorization is sought.

To the Federal Communications Commission:

1. Name of applicant * Matheson Radio Co., Inc.
2. Post-office address: State Massachusetts City Boston
   Street and number 62 Boylston Street
3. Is this application made for—
   (a) Authorization to construct new radio station? No
   (b) Authorization to change present location of transmitter of existing station? No
      (1) What is distance in miles between present location and proposed location of transmitter? -
   (c) Authorization to change maximum rated carrier power, which necessitates installation of new equipment? Yes
      (1) Applicant represents that present maximum rated carrier power is 1,000 watts.
      (2) Applicant represents that proposed maximum rated carrier power is 5,000 watts.
   (d) Authorization to install new equipment? Yes
      (1) Indicate what new equipment is to be installed (check):
         (a) New transmitter Yes (b) Change in system of modulation No
         (c) Change in type or number of vacuum tubes in last radio stage Yes
         (d) Other changes (specify): Directional antenna
4. What is applicant's principal business? Radio broadcasting
   (a) What other business or businesses is applicant directly or indirectly interested in; explain fully? None
   (b) If applicant is a corporation, give the names and addresses of the officers, directors, and principal stockholders and state specifically what other business or businesses each of these parties is directly or indirectly interested in; explain fully? (Attach additional sheets if necessary.) John J. Matheson, President, 282 Washington St., Gloucester, Mass. Ralph G. Matheson, Treasurer, 75 Creaton Rd., West Roxbury, Mass. Martin Hanley, 225 Corey St., West Roxbury, Mass. All of the above are directors, and the only one in any other business is Mr. Hanley who is in the oil business.
5. Is applicant a citizen of the United States? Corporation
   If so, state whether by birth or naturalization
6. Is the applicant a representative of an alien or foreign government? No

* If a corporation, state corporate name; if a partnership, state names of all partners and the name under which the partnership does business; if an unincorporated association, state the name of an executive officer, the office held by him, and the name of the association. The same name or names should be signed in the place provided at the end of application, except that in the case of a partnership, the application may be signed in the name of the partnership by one of the partners.

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7. State whether applicant is a corporation, partnership, or association Corporation

8. If applicant is a corporation—

(a) Under laws of what State or country is it organized? Massachusetts

(A copy of the articles of incorporation properly certified by the Secretary of State shall be attached if not heretofore filed with the Commission.)

(b) Is more than one-fifth of capital stock owned of record or may it be voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country? No

(c) Is any director or officer an alien? No If so, state name, citizenship, and position of each

(d) Give names, addresses, and citizenship of (1) incorporators, (2) directors, (3) officers and (4) stockholders; the offices held by each officer and the number and kind of shares and percentage of issued stock held by each stockholder. (If this information in complete form is now on file and there is no change, reference thereto may be made.)

INCORPORATORS

Name	*Address*	*Citizenship*
Complete information now on file with the Federal Communications Commission. No change since last filing.		

DIRECTORS

Name	*Address*	*Citizenship*
John J. Matheson	282 Washington St.,	Gloucester, Mass.
Ralph G. Matheson	75 Greaton Rd.,	West Roxbury, Mass.
Martin Hanley	225 Corey St.,	West Roxbury, Mass.
All are citizens		

OFFICERS

Name	*Address*	*Office*	*Citizenship*
John J. Matheson	282 Washington St. Gloucester, Mass	President	U. S.
Ralph G. Matheson	75 Greaton Rd., West Roxbury, Mass	Treasurer	U. S.

STOCKHOLDERS

(Use additional sheets if necessary)

Name	*Address*	*Citizenship*	*Number of shares and percentage of issued stock held*
Complete information is on file with Federal Communications Commission.			

(e) Is stock to be sold after this permit is issued for purpose of raising money to construct and/or operate the proposed station? No

If applicant is a corporation is applicant directly or indirectly controlled by any other corporation?

COMPLETE DATA ON FILE

type of tubes On file

Normal plate current, per tube On file Plate voltage On file

(c) List buffer and intermediate power amplifier stages, by number and type of tubes in each stage On file

(d) Last radio stage: Number, manufacturer's name, and type of tubes On file Normal night operation for power requested: Plate current, per tube On file Plate voltage On file

If greater day power than night power is requested, specify the following:

Normal day operation: Plate current, per tube On file Plate voltage On file

Describe fully the proposed method and procedure of reducing power at sunset On file

(e) Modulator or last audio stage: Number, manufacturer's name, and type of tubes and how operated (Class "A", "A Prime", or "B") On file

Normal plate current, per tube On file Plate voltage On file

(f) Which radio stage is modulated? On file

(g) What system of modulation is employed (high level, low level, grid bias in last radio stage, etc.)? On file

(h) If low-level modulation is employed, give for modulated radio stage: Number and type of tubes On file Plate current, per tube On file Plate voltage On file

(i) The transmitter is designed for what maximum percentage of satisfactory modulation?

(j) State name and type number of modulation monitor General Radio Type 731-A

(k) Give Federal Communications Commission approval number 1551

(l) Specify manufacturer's name, type, number, and full scale reading of the following meters:

(1) In last radio stage:

Plate voltmeter

Plate ammeter On file

(2) Antenna ammeter

(m) Describe the plate power supply for last stage On file

Rating: Current On file Voltage On file

(n) Maximum carrier power output of transmitter for satisfactory operation is 5,000 watts.

(o) Maximum rated carrier power of transmitter as determined by orders of the Federal Communications Commission is 5,000 watts

18. Description of automatic frequency control equipment:

(a) Make Western Electric Type No. On file

(b) If composite, give manufacturer's name, type of cut, and temperature coefficient in cycles per degree centigrade of the quartz crystal On file

(c) By whom will unit be calibrated? On file

Calibrated frequency. 850 kilocycles at — degrees centigrade.

Proposed operating frequency: 850 kilocycles. (Give exact figure, correct to third decimal place at on file degrees centigrade.

(d) State guaranteed accuracy of the calibration: On file cycles.

and (4) stockholders; the offices held by each officer and the number and kind of share and percentage of issued stock held by each stockholder. (If this information in complete form is now on file and there is no change, reference thereto may be made.)

INCORPORATORS

Name	*Address*	*Citizenship*
Complete information now on file with the Federal Communications Commission. No change since last filing.		

DIRECTORS

Name	*Address*	*Citizenship*
John J. Matheson	282 Washington St.,	Gloucester, Mass.
Ralph G. Matheson	75 Greaton Rd.,	West Roxbury, Mass.
Martin Hanley	225 Corey St.,	West Roxbury, Mass.
All are citizens		

OFFICERS

Name	*Address*	*Office*	*Citizenship*
John J. Matheson	282 Washington St. Gloucester, Mass	President	U. S.
Ralph G. Matheson	75 Greaton Rd., West Roxbury, Mass	Treasurer	U. S.

STOCKHOLDERS

(Use additional sheets if necessary)

Name	*Address*	*Citizenship*	*Number of shares and percentage of issued stock held*
Complete information is on file with Federal Communications Commission.			

(e) Is stock to be sold after this permit is issued for purpose of raising money to construct and/or operate the proposed station? No

9. If applicant is a corporation, is applicant directly or indirectly controlled by any other corporation? No

(a) If so, give name and address of such controlling corporation

(*b*) Under laws of what State or country is such corporation organized? _____

(A copy of the articles of incorporation properly certified by the Secretary of State shall be attached if not heretofore filed with the Commission.)

(*c*) Is more than one-fourth of capital stock of such corporation owned of record or may it be voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country? _____

(*d*) Is any director or officer of such corporation an alien? _____ If so, state name, citizenship, and position of each _____

(*e*) Give names, addresses, and citizenship of (1) incorporators, (2) directors, (3) officers, and (4) stockholders; the offices held by each officer and the number and kind of shares and percentage of issued stock held by each stockholder. (If this information in complete form is now on file and there is no change, reference thereto may be made.)

INCORPORATORS

Name	*Address*	*Citizenship*

DIRECTORS

Name	*Address*	*Citizenship*

OFFICERS

Name	*Address*	*Office*	*Citizenship*

STOCKHOLDERS

(Use additional sheets if necessary)

Name	*Address*	*Citizenship*	*Number of shares and percentage of issued stock held*

(*f*) Is the above-described controlling corporation in turn a subsidiary? _____

If so, attach additional sheets answering question 9 (*a*) to (*e*), inclusive, for each com-

COMPLETE DATA ON FILE W

(*k*) State manufacturer's name and rated accuracy of: Thermostat On file

Thermometer On file

(*l*) Attach the circuit diagram of automatic temperature control system if not already on file with the Commission. On file

(*m*) Attach a sketch or drawing of the automatic temperature control chamber, if not already on file with the Commission. On file

(*n*) Describe checking means used for determining if transmitter retains assigned frequency Periodic check from approved frequency measuring service

(*o*) State name and type number of separate frequency monitor Western Electric 1A

(*p*) Give Federal Communications Commission approval number 1455

19. Applicant represents (1) that there is attached or (2) that there has been heretofore filed with the Commission, an accurate schematic diagram of the fundamental radio and audio circuits of the transmitter proposed, including antenna and ground or counterpoise connections, antenna feed system, and that it indicates the type of tubes.

(This should be a blueprint or ink drawing, and, if possible, the size of this application, and attached hereto.)

20. (*a*) Type of antenna Directive

(*b*) Height of vertical lead 271 feet.

(*c*) Length of flat top (if any) None feet.

(*d*) Give maximum height (in feet) of towers above ground level 280

(*e*) Will towers be painted and marked with signal lights to conform with specifications of Department of Commerce (see Aeronautics Bulletin No. 474)? Yes

(*f*) If not fully described above, give complete details See attached Directive antenna design data

(*g*) Counterpoise (if used)—type and dimensions None

(*h*) Antenna ground (if used)—how obtained? Buried radials

21. Cost of proposed station: Transmitter, $50,000 Studio, $ - Other items (state nature) $10,000 Directive Antenna

22. Proposed location of transmitter: State Massachusetts County Essex

City or town Saugus Street and number 250 Salem Turnpike

North latitude: Degrees 42, minutes 28, seconds 15

West longitude: Degrees 70, minutes 59, seconds 40

23. Number of persons residing within various distances of proposed location of transmitter is as follows: 0.4 mile 0, 1 mile 200, 2 miles 2,500 3 miles 60,000 5 miles 710,000 miles 1,561,000

24. (*a*) Number of broadcasting stations (by call letters) located within various distances of proposed location of transmitter is as follows:

1 mile None, 2 miles None

3 miles WEEI, 8 miles WBZ WBZA

(*b*) Number of nonbroadcasting (commercial or Government) RECEIVING stations located within various distances of proposed location of transmitter is as follows:

1 mile None, 2 miles None, 3 miles None

25. (*a*) Name and give location of all AIRPORTS within 10 miles of proposed location of transmitter

East Boston Airport - East Boston, Mass.

Naval Reserve and Dennison Fields - Squantum, Mass.

Muller Field - Revere, Mass. (6)

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and percentage of issued stock held by each stockholder. (If this information in complete form is now on file and there is no change, reference thereto may be made.)

INCORPORATORS

Name	*Address*	*Citizenship*

DIRECTORS

Name	*Address*	*Citizenship*

OFFICERS

Name	*Address*	*Office*	*Citizenship*

STOCKHOLDERS

(Use additional sheets if necessary)

Name	*Address*	*Citizenship*	*Number of shares and percentage of issued stock held*

(*f*) Is the above-described controlling corporation in turn a subsidiary? _____ If so, attach additional sheets answering question 9 (*a*) to (*e*), inclusive, for each company to and including the organization having final control.

10. If application is made in behalf of a copartnership, there must be submitted a certified copy of the articles of copartnership. (If articles have heretofore been filed with the Commission, reference thereto may be made.) _____

11. If application is made in behalf of an unincorporated association, there must be submitted a certified copy of the articles of association and bylaws (unless heretofore filed with the Commission), showing the purpose of the association _____

Applicant must also show—

(1) The names, addresses, and citizenship of the officers and the offices held by each _____

(2) The number of members _____

(3) Whether any members are aliens _____

(4) The name, nationality, and position of each alien _____

12. (*a*) Is applicant directly or indirectly, through stock ownership, contract, or otherwise, interested in the ownership or control of any other radio broadcasting stations? No

If so, state call letters and location of such stations _____

(*b*) Has the applicant in the past been directly or indirectly interested in the ownership or control of any radio broadcasting stations? Yes

If so, state call letters and location of such stations WKPS transferred by voluntary assignment of license to Worcester, Mass.

13. (*a*) State applicant's relation to station (whether applicant is to be owner or lessee, and, if neither owner nor lessee, state nature of applicant's interest in use and control of station) Owner

(If not owner, a copy of agreement showing applicant's interest in station must be attached if not heretofore filed with the Commission)

(*b*) If applicant is not to be owner of station, who is? _____

(*c*) Will applicant have absolute control of station, both as to physical operation and program broadcast? Yes

If not, attach copy of any contract which may in any way affect applicant's right to do so.

14. Attach detailed financial statement showing applicant's assets and liabilities and state fully the facts showing applicant's financial responsibility with respect to the construction and operation of station Exhibit A, hereto attached.

15. (*a*) Has the applicant been finally adjudged guilty by any Federal court of unlawful monopolizing, or attempting unlawfully to monopolize, radio communication directly or indirectly through control of manufacture or sale of radio apparatus, exclusive traffic arrangements, or any other means, or of unfair methods of competition? No

(*b*) Is applicant directly or indirectly controlled by any party finally adjudged guilty as above stated? No

(Answer yes or no)

16. The frequency, power, and hours of operation requested for the proposed station are as follows:

(*a*) Frequency 850 kilocycles.

(*b*) Power (night) 5,000 watts. (*c*) Power (day) 5,000 watts.

(*d*) Hours of operation:

(f) Does applicant request the assignment of all or any part of the facilities (i. e., frequency, power, and/or hours of operation) now assigned to any other station or stations? No
(Answer yes or no)

If so, specify the station or stations and state accurately the facilities requested to be withdrawn therefrom None

17. Description of transmitting apparatus proposed to be installed—

(a) Make Western Electric Type no. 405-A1

(b) Oscillator: Type of circuit On file Number, manufacturer's name, and type of tubes On file

Normal plate current, per tube On file Plate voltage On file

(c) List buffer and intermediate power amplifier stages, by number and type of tubes in each stage On file

(d) Last radio stage: Number, manufacturer's name, and type of tubes On file Normal night operation for power requested: Plate current, per tube On file Plate voltage On file

If greater day power than night power is requested, specify the following:

Normal day operation: Plate current, per tube On file Plate voltage On file

Describe fully the proposed method and procedure of reducing power at sunset On file

(e) Modulator or last audio stage: Number, manufacturer's name, and type of tubes and how operated (Class "A", "A Prime", or "B") On file

Normal plate current, per tube On file Plate voltage On file

(f) Which radio stage is modulated? On file

(g) What system of modulation is employed (high level, low level, grid bias in last radio stage, etc.)? On file

(h) If low-level modulation is employed, give for modulated radio stage: Number and type of tubes On file Plate current, per tube On file Plate voltage On file

(i) The transmitter is designed for what maximum percentage of satisfactory modulation?

(j) State name and type number of modulation monitor General Radio Type 731-A

(k) Give Federal Communications Commission approval number 1551

(l) Specify manufacturer's name, type, number, and full scale reading of the following meters:

(1) In last radio stage:

Plate voltmeter

Plate ammeter On file

(2) Antenna ammeter

(m) Describe the plate power supply for last stage On file

Rating: Current On file Voltage On file

(n) Maximum carrier power output of transmitter for satisfactory operation is 5,000 watts.

(o) Maximum rated carrier power of transmitter as determined by orders of the Federal Communications Commission is 5,000 watts

18. Description of automatic frequency control equipment:

(a) Make Western Electric Type No. On file

(b) If composite, give manufacturer's name, type of cut, and temperature coefficient in cycles per degree centigrade of the quartz crystal On file

(c) By whom will unit be calibrated? On file

Calibrated frequency. 850 kilocycles at — degrees centigrade.

Proposed operating frequency: 850 kilocycles. (Give exact figure, correct to

COMPLETE DATA ON FILE

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COMPLETE DATA ON FILE WITH FCC

(e) State number of frequency control oscillators which will be maintained constantly at correct operating temperature and frequency in heat-controlled chambers On file

(f) Is provision made for instantaneous connection of spare frequency control units? On file

(g) Manufacturer's name and type of automatic temperature control: On file

(h) State within what limit automatic temperature control will hold the temperature: _____ degrees centigrade.

(i) State temperature coefficient of the frequency control units: On file cycles per degree centigrade.

(j) Is temperature coefficient positive or negative? On file

(k) State manufacturer's name and rated accuracy of: Thermostat On file
Thermometer On file

(l) Attach the circuit diagram of automatic temperature control system if not already on file with the Commission. On file

(m) Attach a sketch or drawing of the automatic temperature control chamber, if not already on file with the Commission. On file

(n) Describe checking means used for determining if transmitter retains assigned frequency Periodic check from approved frequency measuring service

(o) State name and type number of separate frequency monitor Western Electric 1A

(p) Give Federal Communications Commission approval number 1455

19. Applicant represents (1) that there is attached or (2) that there has been heretofore filed with the Commission, an accurate schematic diagram of the fundamental radio and audio circuits of the transmitter proposed, including antenna and ground or counterpoise connections, antenna feed system, and that it indicates the type of tubes.
(This should be a blueprint or ink drawing, and, if possible, the size of this application, and attached hereto.)

20. (a) Type of antenna Directive
(b) Height of vertical lead 271 feet.
(c) Length of flat top (if any) None feet.
(d) Give maximum height (in feet) of towers above ground level 280
(e) Will towers be painted and marked with signal lights to conform with specifications of Department of Commerce (see Aeronautics Bulletin No. 474)? Yes
(f) If not fully described above, give complete details See attached Directive antenna design data
(g) Counterpoise (if used)—type and dimensions None
(h) Antenna ground (if used)—how obtained? Buried radials

21. Cost of proposed station: Transmitter, $30,000 Studio, $ - Other items (state nature) $10,000 Directive Antenna

22. Proposed location of transmitter: State Massachusetts County Essex
City or town Saugus, Street and number 250 Salem Turnpike
North latitude: Degrees 42, minutes 28, seconds 15
West longitude: Degrees 70, minutes 59, seconds 40

23. Number of persons residing within various distances of proposed location of transmitter is as follows: 0.4 mile 0, 1 mile 200, 2 miles 2,500 3 miles 60,000 5 miles 710,000 miles 1,561,000

24. (a) Number of broadcasting stations (by call letters) located within various distances of proposed location of transmitter is as follows:
1 mile None, 2 miles None
3 miles WEEI, 8 miles WBZ WBZA

(b) Number of nonbroadcasting (commercial or Government) RECEIVING stations located within various distances of propposed location of transmitter is as follows:
1 mile None, 2 miles None, 3 miles None

25. (a) Number of miles of all AIRPORTS within 10 miles of proposed location of transmitter

(b) Give distance from proposed location of transmitter to each of such airports
East Boston Airport - 5.75 miles
Squantum Airports - 9.5 "
Miller Field - 1.75 "

(c) Name and give distance to any established AIRWAYS within 10 miles of proposed location of transmitter Boston-Portland Airway - 2 miles

(d) If application is for new station or change of location of existing station, attach map showing present location, proposed location, character of surrounding area (retail or wholesale business, manufacturing, residential, or unpopulated, the heights of all tall buildings, if any, in the vicinity of the antenna indicating the distance and direction thereof from the proposed site; also, density of population, type of soil and terrain) and the location of airports, airways, and other radio stations, including receiving stations, except broadcast or amateur.

26. Proposed location of main studio: State Massachusetts County Suffolk
City or town Boston Street and number 62 Boylston Street
Other studios maintained by station None

27. Average percentage of time expected to be devoted monthly to following services:

	Commercial Programs		Sustaining Programs (Gen'l)
(1)	Entertainment	20.15	20.91
(2)	Educational	2.21	1.98
(3)	Religious	2.21	1.40
(4)	Agricultural	.01	.82
(5)	Fraternal		.21
(6)	Fishermen	.08	7.
(7)			Non-duplicatable entertainment 55.06
(8)			News 8%

28. (a) Does applicant expect to obtain programs from what is known as a "chain"? No
(b) Name of chain or chains
(c) What will be the percentage of total time proposed to be used for chain programs (i. e., programs, both paid and sustaining, which are duplicated by any other station)?
(d) What will be the percentage of total time proposed to be used for mechanical reproduction (i. e., phonograph records, electrical transcriptions, player piano, etc.)? 25%

29. (a) State the objects to be attained by the construction, or changes in construction, for which application is made To allow full time operation to WHDH; to render increased service to Boston and Massachusetts Bay area and with increased power enlarge the range of the good service area and increase the intensity of signal in the Boston metropolitan area to meet higher standards of reception.

(b) State definitely what service will be rendered by the proposed station which is not now available to the community which it expects to serve Improve general broadcasting service of station; provide a complete day and night service for fishermen at sea, also a complete local independent program broadcast by no other station.

30. If for special broadcast on a frequency of 1530, 1550, or 1570 kilocycles, supply fully the following:

(a) Outline the program of research and experiment calculated to contribute to the development and practical application of high fidelity broadcasting No

present location, proposed location, character of surrounding area (retail or wholesale business, manufacturing, residential, or unpopulated, the heights of all tall buildings, if any, in the vicinity of the antenna indicating the distance and direction thereof from the proposed site; also, density of population, type of soil and terrain) and the location of airports, airways, and other radio stations, including receiving stations, except broadcast or amateur.

26. Proposed location of main studio: State Massachusetts County Suffolk
City or town Boston Street and number 62 Boylston Street
Other studios maintained by station None

27. Average percentage of time expected to be devoted monthly to following services:

Commercial Programs		Sustaining Programs	
(1) Entertainment	20.15	(1) Entertainment (Gen'l)	20.91
(2) Educational	2.21	(2) Educational	1.98
(3) Religious	2.21	(3) Religious	1.40
(4) Agricultural	.01	(4) Agricultural	.82
(5) Fraternal		(5) Fraternal	.21
(6) Fishermen	.08	(6) Fishermen	7.
(7)		(7) Non-duplicatable entertainment	35.06
		(8) News 8%	

28. (a) Does applicant expect to obtain programs from what is known as a "chain"? No
(b) Name of chain or chains
(c) What will be the percentage of total time proposed to be used for chain programs (i. e., programs, both paid and sustaining, which are duplicated by any other station)?
(d) What will be the percentage of total time proposed to be used for mechanical reproduction (i. e., phonograph records, electrical transcriptions, player piano, etc.)? 23%

29. (a) State the objects to be attained by the construction, or changes in construction, for which application is made To allow full time operation to WHDH; to render increased service to Boston and Massachusetts Bay area and with increased power enlarge the range of the good service area and increase the intensity of signal in the Boston metropolitan area to meet higher standards of reception.
(b) State definitely what service will be rendered by the proposed station which is not now available to the community which it expects to serve Improve general broadcasting service of station; provide a complete day and night service for fishermen at sea, also a complete local independent program broadcast by no other station.

30. If for special broadcast on a frequency of 1530, 1550, or 1570 kilocycles, supply fully the following:
(a) Outline the program of research and experiment calculated to contribute to the development and practical application of high fidelity broadcasting No
(b) Qualifications of engineers supervising research and taking observations No

(c) Description of equipment for taking observations No

(d) Plans for listeners' cooperation and analysis of response No

(e) Results expected and detailed bases therefor No

(f) Any other pertinent information No

31. If the construction permit is granted, the construction will be commenced within 30 days of the granting thereof and will be completed and the station ready for operation within 90 days thereafter.

32. The applicant waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a construction permit in accordance with this application.

Dated this 27th day of July, 19 38

Matheson Radio Co., Inc.
(Must correspond with item 1) Applicant.

By R. G. Matheson Treasurer

Treasurer
Official.

(BE SURE ALL NECESSARY INFORMATION IS FURNISHED)

STATE OF Massachusetts
COUNTY OF Suffolk } ss:

RALPH G. MATHESON, being duly {sworn upon his oath, affirmed according to law,

deposes and says that he is the Treasurer
(If applicant is not an individual, state relation of affiant to applicant)

above-named applicant, and that the facts stated in the foregoing application and all exhibits attached thereto are true of his own knowledge, except as to such statements as are therein stated on information and belief, and as to such statements he believes them to be true.

Ralph G. Matheson
Affiant.

Subscribed and sworn to before me this 27th day of July, 19 38

[SEAL]

Mary Brennahan
Notary Public.

(f) Any other pertinent information No

31. If the construction permit is granted, the construction will be commenced within 30 days of the granting thereof and will be completed and the station ready for operation within 90 days thereafter.

32. The applicant waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a construction permit in accordance with this application.

Dated this 27th day of July, 19 38

Matheson Radio Co., Inc.
(Must correspond with item 1) Applicant.

R G Matheson Treasurer

By

Treasurer
Official

(BE SURE ALL NECESSARY INFORMATION IS FURNISHED)

STATE OF Massachusetts
COUNTY OF Suffolk } ss:

RALPH G. MATHESON, being duly {sworn upon his oath, affirmed according to law,

deposes and says that he is the Treasurer
(If applicant is not an individual, state relation of affiant to applicant)

above-named applicant, and that the facts stated in the foregoing application and all exhibits attached thereto are true of his own knowledge, except as to such statements as are therein stated on information and belief, and as to such statements he believes them to be true.

Ralph G. Matheson
Affiant.†

Subscribed and sworn to before me this 27th day of July, 19 38

[SEAL]

Mary Brenahan
Notary Public.

(Notary public's seal must be affixed where law of jurisdiction requires, otherwise state that law does not require seal.)

My commission expires March 2, 1939

† Must be subscribed and verified by party applicant, by one of the parties if more than one, by an officer if applicant is a corporation, or by attorney of applicant only under the provisions of Rule 105.24 which must be fully explained.

U.S. GOVERNMENT PRINTING OFFICE 16—661

55 September 21, 1938

Matheson Radio Company, Inc.,
62 Boylston Street,
Boston, Massachusetts.

Gentlemen:

Re: Your application File No. B1-P-2201,
Call Letters WHDH.

Receipt is acknowledged of the above application for construction permit which requests authority to install a new transmitter employing directional antenna for nighttime use, increase power from 1 kw to 5 kw, and change hours of operation from daytime to sunset at Denver, Colorado, to unlimited time.

In this connection, it is desired to call to your attention the provisions of Rule 104.7 to the effect that where an applicant has an application pending and undecided, no other inconsistent or conflicting application filed by or on behalf of the same party will be accepted for consideration.

The Commission records show that on June 30, 1936, there was received an application (B1-SA-210) for special experimental authority from Station WHDH, which was amended May 18, 1938, requesting authority to install a new transmitter employing directional antenna for nighttime use, increase power from 1 kw to 5 kw, and change hours of operation from daytime to sunset at Denver, Colorado, to unlimited time for a period of sixty days of the next six months' license period. That application was designated for hearing on July 27, 1938, but no date has been set for the hearing.

In view of the fact that the instant application requests substantially the same authority which is the subject matter of the former application, it is being returned to you under the provisions of the above Rule.

Very truly yours,

T. J. SLOWIE,
Secretary.

12

GMH:cm
cc Mrs. Mabel Willebrandt
Attorney-at-Law
739 Shoreham Bldg., Washington, D. C.

59 November 22, 1938

Matheson Radio Co. Inc.
Radio Station WHDH
Hotel Touraine, 62 Boylston St.
Boston, Massachusetts

Gentlemen:

Re: Application File No. B1-P-2201

The Commission is considering your recent application, resubmitted October 25, 1938, for construction permit to install new equipment and directional antenna system, increase power from 1 kilowatt to 5 kilowatts, and time of operation from daytime only to unlimited time, employing directional antenna system for night operation.

It is noted that the population figures required under Section 3 of the Standards of Good Engineering Practice, for the 250, 25, 5 and 0.5 mv/m contours, have not been submitted. It will be necessary to submit this information for both day and nighttime operation before further action can be taken on your application.

Any amendment or modification should be subscribed and sworn to in the same manner as was the original application.

Very truly yours,

T. J. SLOWIE,
Secretary.

Copies to Page & Davis
Mrs. Willebrandt
Miss Iehl

JAW:ge/b

60 Mabel Walker Willebrandt

D. W. Walker
Wm. Montgomery Smith
Charles B. Jennings

739 Shoreham Building
Washington, D. C.

Cable Address
WILBRANT Washington

Los Angeles Office
745 Title Insurance Building
433 South Spring Street

Washington, D. C.
November 25, 1938

Federal Communications Commission
Washington, D. C.

Attention: Mr. T. J. Slowie Secretary Radio Division
In re: Application—File No. B1-P-2201

Dear Mr. Slowie:

I have before me the carbon of your letter dated November 22, 1938, addressed to Matheson Radio Co., Inc., Radio Station WHDH, Boston, Massachusetts, in which you ask for certain information concerning population figures and you state that these population figures are "required in Section 3 of the Standards of Good Engineering Practice for the 250, 25, 5, and 0.5 mv/m contours."

From an examination of the rules and regulations now in force as promulgated by the Federal Radio Commission, I cannot see where population figures as suggested are required, but since you ask for them we will see that they are compiled and promptly supplied to you.

However, I trust that the few days that it will take to compile and forward this information to you will not be used as further delay in setting the application of WHDH down for hearing as it has been pending already for an extended period of time.

Very truly yours,
MABEL WALKER WILLEBRANDT

MWW:McS

64 Mabel Walker Willebrandt

D. W. Walker
Wm. Montgomery Smith

Cable Address
WILBRANT Washington, D. C.

739 Shoreham Building
Washington, D. C.
December 5, 1938

The Secretary
Federal Communications Commission
Washington, D. C.

Re: Application file No. B1-P-2201
Matheson Radio Co., Inc. Station WHDH

Dear Sir:

In accordance with your request of November 22, 1938, we are submitting herewith, as amendments to the application above referred to, duplicate copies of the population figures for 250, 25, 5 and 0.5 mv/m contours, together with duplicate verifications by Ralph G. Matheson, Treasurer of Matheson Radio Co., Inc.

I trust that this meets the requirements of the Commission.

Yours very truly,

MABEL WALKER WILLEBRANDT
By WM. MONTGOMERY SMITH

148 Before the Federal Communications Commission
Washington, D. C.

Docket No. 5453

In re Application of
MATHESON RADIO COMPANY, INC. (WHDH)
BOSTON, MASSACHUSETTS

For Construction Permit

Order

Upon further consideration of the above-described application,

It Is Ordered, This 10th day of October, 1939, that the hearing upon said application now scheduled for October 18, 1939, Be, And The Same Is Hereby, Continued without date.

By the Commission

T. J. SLOWIE
Secretary.

(Seal)

149 Before the Federal Communications Commission
Washington, D. C.

Docket No. 5453

In re Application of
MATHESON RADIO COMPANY, INC. (WHDH)
BOSTON, MASSACHUSETTS

For Construction Permit

Motion to Vacate Commission Order of October 10, 1939, Indefinitely Continuing Hearing and to Set Date Certain for Hearing

Comes now Matheson Radio Company, Inc., applicant in the above-entitled cause, and moves the Commission to vacate its Order of October 10, 1939, which reads as follows:

"Upon further consideration of the above-described application,

It Is Ordered, This 10th day of October, 1939, that the hearing upon said application now scheduled for October 18, 1939, Be, And The Same Hereby Is, Continued without date.

By the Commission
Secretary"

and to reinstate the hearing on the application herein previously ordered to be held at 10:00 a.m., on October 18, 1939, or to set a date certain for hearing not later than 10:00 a.m., November 17, 1939, and in support hereof shows as follows:

I

Several months after the filing of the instant application and on January 3, 1939, said application was designated for hearing before the Commission, but no hearing date was set.

Eight months later, on July 26, 1939, the Commission entered an Order directing that the hearing commence at 10:00 a.m., on October 10, 1939.

On September 2, 1939, the Commission released the Notice of Hearing which set forth the issues the Commission desired to have determined.

II

Upon being advised of the hearing date the applicant proceeded to prepare its case with the greatest diligence.
150 This preparation was necessarily intensive and required long hours of constant and difficult effort each day. The applicant expended large sums of money in the course of its preparation. Also, at great expense, the applicant engaged in the services of counsel, engineers, an auditor and other experts.

III

On the applicant's request the Commission on September 15, 1939, ordered the taking of depositions of 33 persons. The applicant proceeded to take said depositions at great cost.

On October 6, 1939, on the Commission's own motion the hearing was continued to October 18, 1939.

IV

The applicant is ready to go to hearing on October 18, 1939, and intends to present its witnesses at the time and place shown in the Commission' order of October 6, 1939, directing that the hearing be held on October 18, 1939. At that time WHDH stands ready to show that its operation as proposed will render the type of service expected of Class II stations and will not interfere with the operation of Sta-

tion KOA or any other station, nor with the future operation of any station; that the operation of WHDH will in no way injure anyone, but on the contrary will be in the public interest, convenience, and necessity in all respects; and that any Commission rules relied upon to prevent such specific operation of WHDH are wholly unreasonable and find no authority in the Communications Act of 1934.

The applicant does not object to a continuance for a period of thirty days, namely, until November 17, 1939, as its counsel has advised Commission officials, but it is aggrieved and greatly injured by an indefinite continuance in the face of its intensive preparation and the expenditure of large sums of money pursuant to the Commission successive orders finally setting October 18, 1939, as the hearing date.

The applicant has made its great efforts and has been extremely diligent because of the apparent mutual desire of the Commission and applicant to hear and determine the important and urgent issues involved in this case.

Wherefore, it is requested that the Order of October 10, 1939, be vacated and that the hearing be held on October 18, 1939, as heretofore ordered, or that a date certain for hearing be set not later than November 17, 1939.

MATHESON RADIO COMPANY, INC.

By: ANDREW G. HALEY
W. THEODORE PIERSON
Its Attorneys

160 Federal Communications Commission
Washington, D. C.

October 20, 1939.

Docket No. 5453

In re Application of
MATHESON RADIO COMPANY, INC. (WHDH)
BOSTON, MASSACHUSETTS

For Construction Permit.

Notice

The Commission on October 10, 1939, having on its own motion, continued without date the hearing of the above-entitled application, and on October 17, 1939, having designated the matter to be heard before Commissioner Case, you are hereby notified that the said hearing will be held in the offices of the Commission, Washington, D. C., on December 11, 1939, at 10:00 o'clock a.m., E.S.T.

By direction of Norman S. Case, Commissioner.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

165 Before the Federal Communications Commission
Washington, D. C.

Docket No. 5453

In re Application of
MATHESON RADIO COMPANY, INC. (WHDH)
BOSTON, MASSACHUSETTS

For Construction Permit

Notice

The Commission on November 20, 1939, having designated that Commissioner Case be authorized and empowered to set

the time and place for a hearing on the above-entitled application, you are hereby notified that said hearing, previously designated for December 11, 1939, will be held in the offices of the Commission, Washington, D. C., on January 15, 1940, at 10:00 A.M., E.S.T.

By direction of Norman S. Case, Commissioner, this the 5th day of December, 1939.

FEDERAL COMMUNICATIONS COMMISSION

JOHN B. REYNOLDS,
Acting Secretary.

167 Before the Federal Communications Commission
Washington, D. C.

Docket No. 5453

In re:
MATHESON RADIO COMPANY, INC. (WHDH)
BOSTON, MASSACHUSETTS

Order

Upon the Commission's own motion It Is Ordered that the hearing upon the above entitled application, now scheduled for January 15, 1940, Be, And The Same Is Hereby, Continued to 10 o'clock, A. M., January 29, 1940.

By the Commission,

COMMISSIONER CASE.
T. J. SLOWIE,
Secretary.

Dated this 6th day of January, 1940.

~~Appellant's Ex. 7~~

Intervenor's Ex. 7.

PAGE & DAVIS

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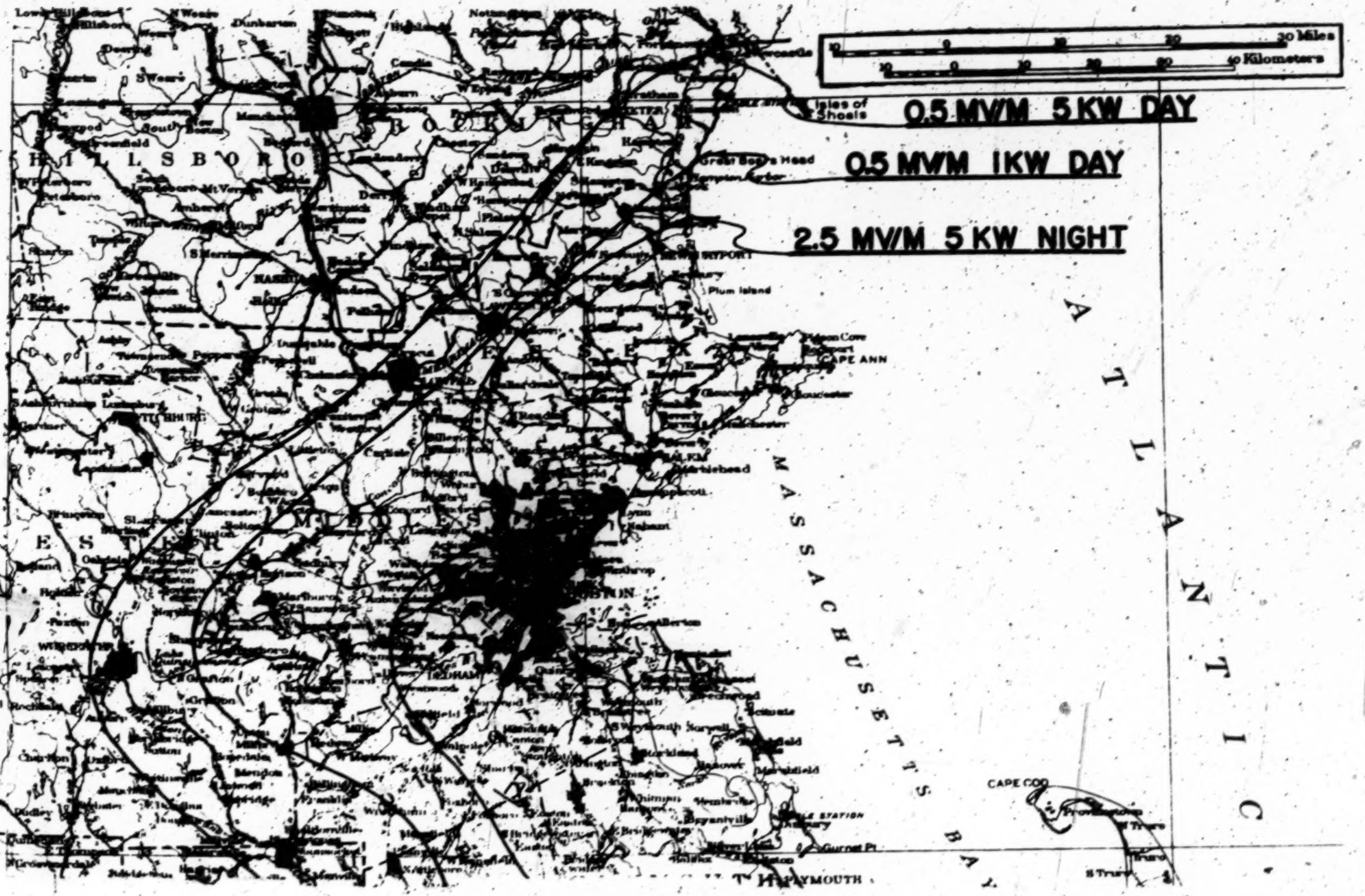
FEB 2 1940
DOCKET SECT.

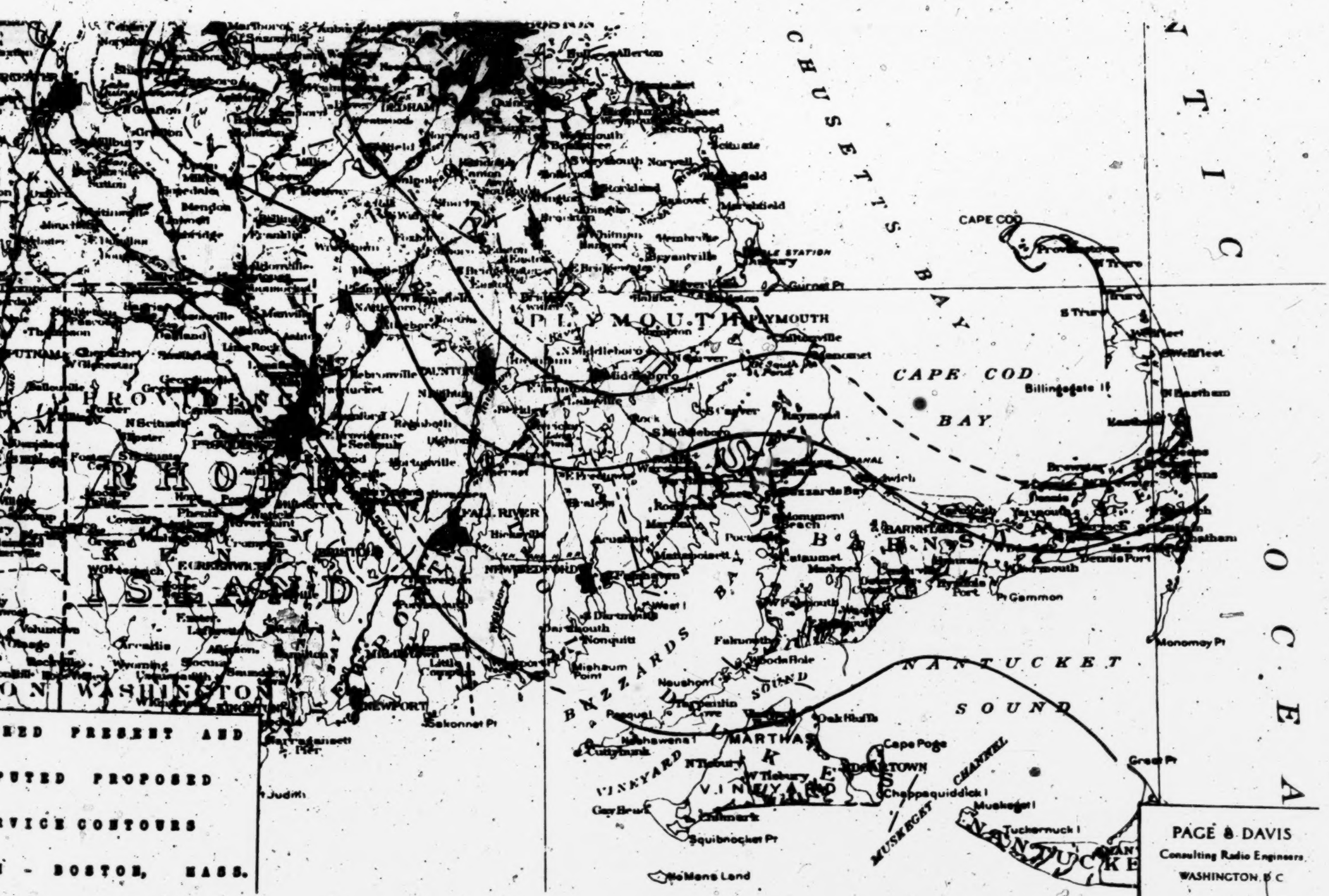
W H D H - ADDITIONAL HOURS OF OPERATION REQUESTED

Month	WHDH present sign-off Denver sunset (Mountain Time)	Time at Boston (E. S. T.)	Additional hours to midnight Boston
January	5:00	7:00	5:00
February	5:30	7:30	4:30
March	6:00	8:00	4:00
April	6:30	8:30	3:30
May	7:00	9:00	3:00
June	7:30	9:30	2:30
July	7:30	9:30	2:30
August	7:00	9:00	3:00
September	6:15	8:15	3:45
October	5:15	7:15	4:45
November	4:45	6:45	5:15
December	4:30	6:30	5:30

DOCKET NO. 5463
WHDH Exhibit 7 (Page 1)
Hearing before Federal Communications
Commission 1-29-40
Electrotyper, Inc., Official Reporter.

Intervenor's Ex. 20.





ED PRESENT AND

UTED PROPOSED

VICE CONTOURS

- BOSTON, MASS.

Intervenor's Ex. 22.

~~PAGE & DAVIS~~

1157-2

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FEB 21940
DOCKET SECTION

WHDH POPULATION STUDY

Number of persons residing within various contours

-DAYTIME-

Present 0.5 mv/m contour (1kw).....2,472,000

Proposed 0.5 mv/m contour (5kw).....3,093,000

Proposed 5kw night-time using directive antenna - 2.5 mv/m.....2,285,700

Number within the 2.5 mv/m contour residing within the Boston metropolitan area.....2,185,800

Population of Boston metropolitan area.....2,307,897

94.9% of the population of the Boston metropolitan area will receive interference-free service at night of 2.5 mv/m or more from WHDH as proposed.

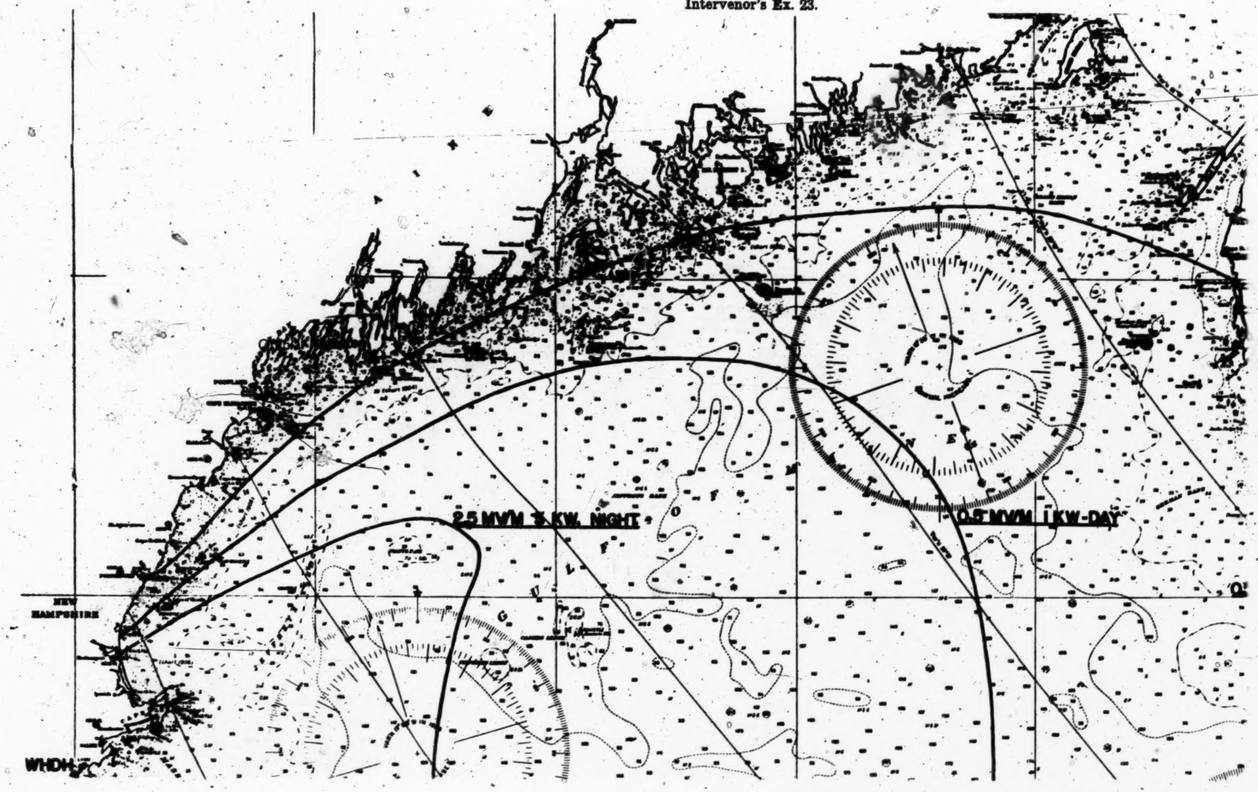
Docket No. 5453

Applicant _____ Exhibit 22

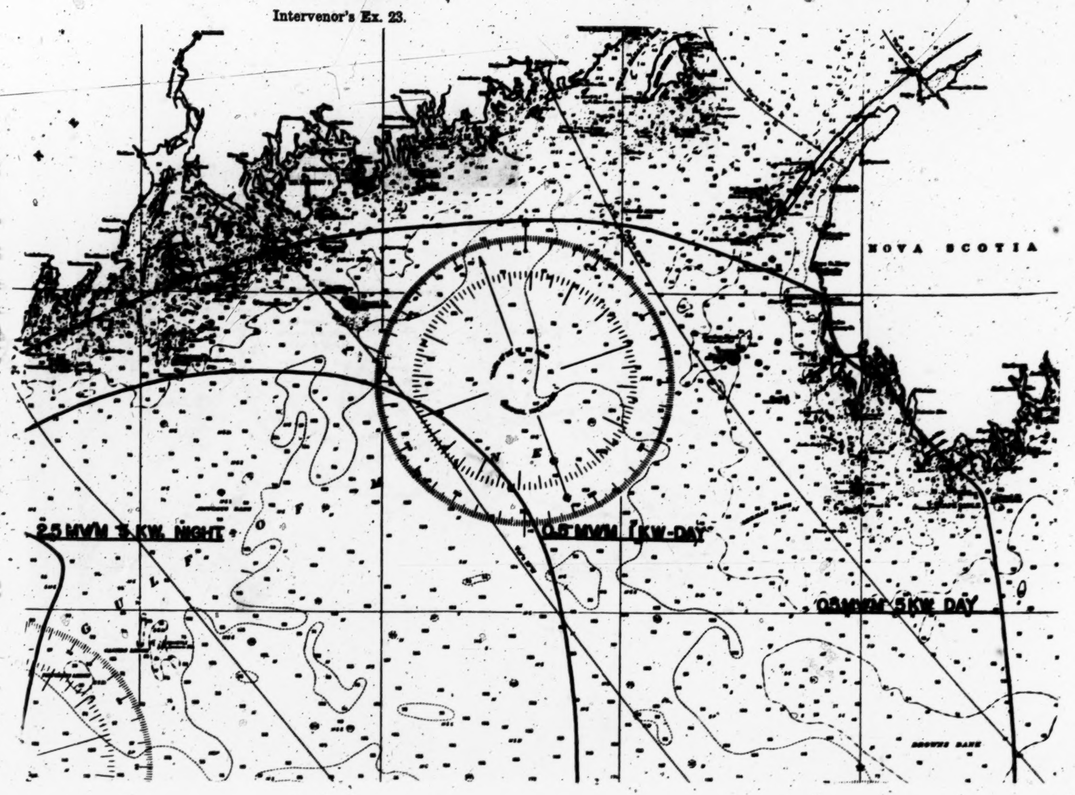
Hearing before Federal Communications Commission 1/29

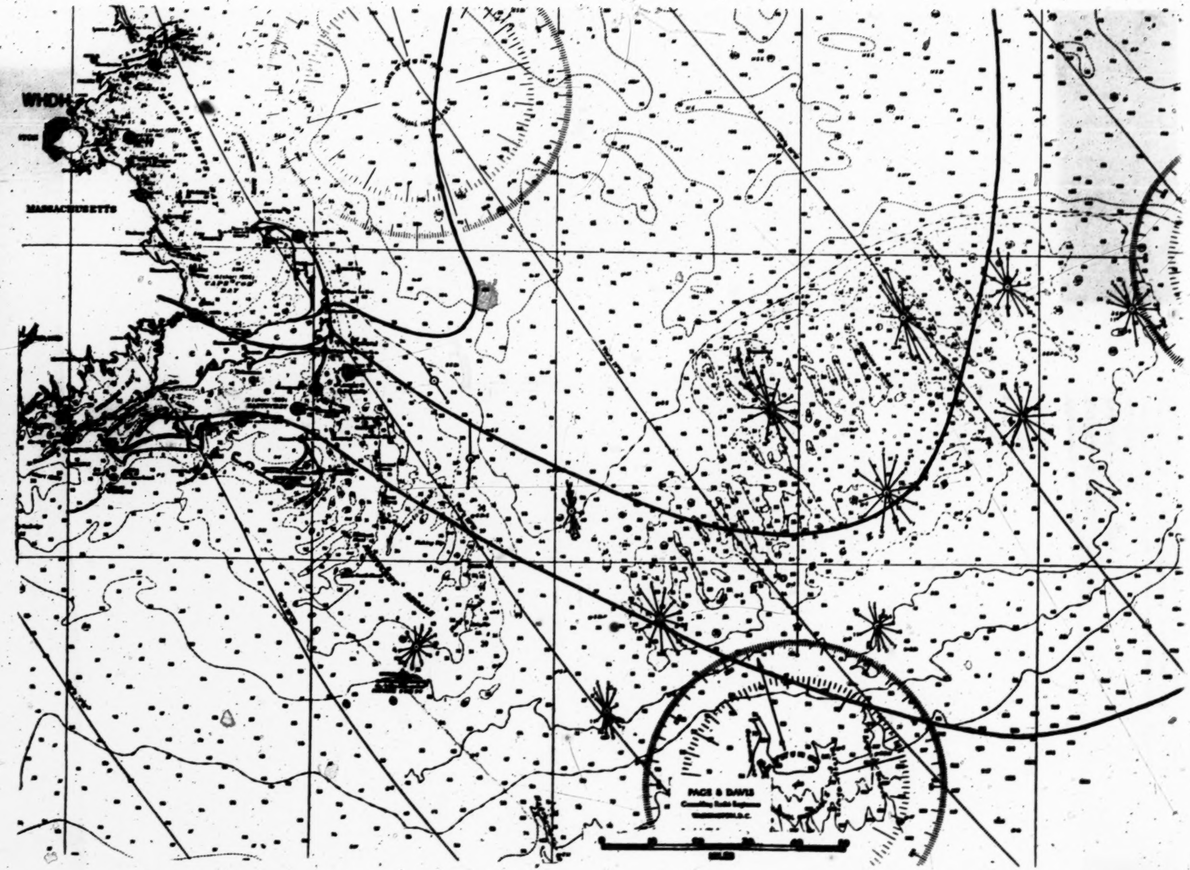
Electronic Official Reporter.

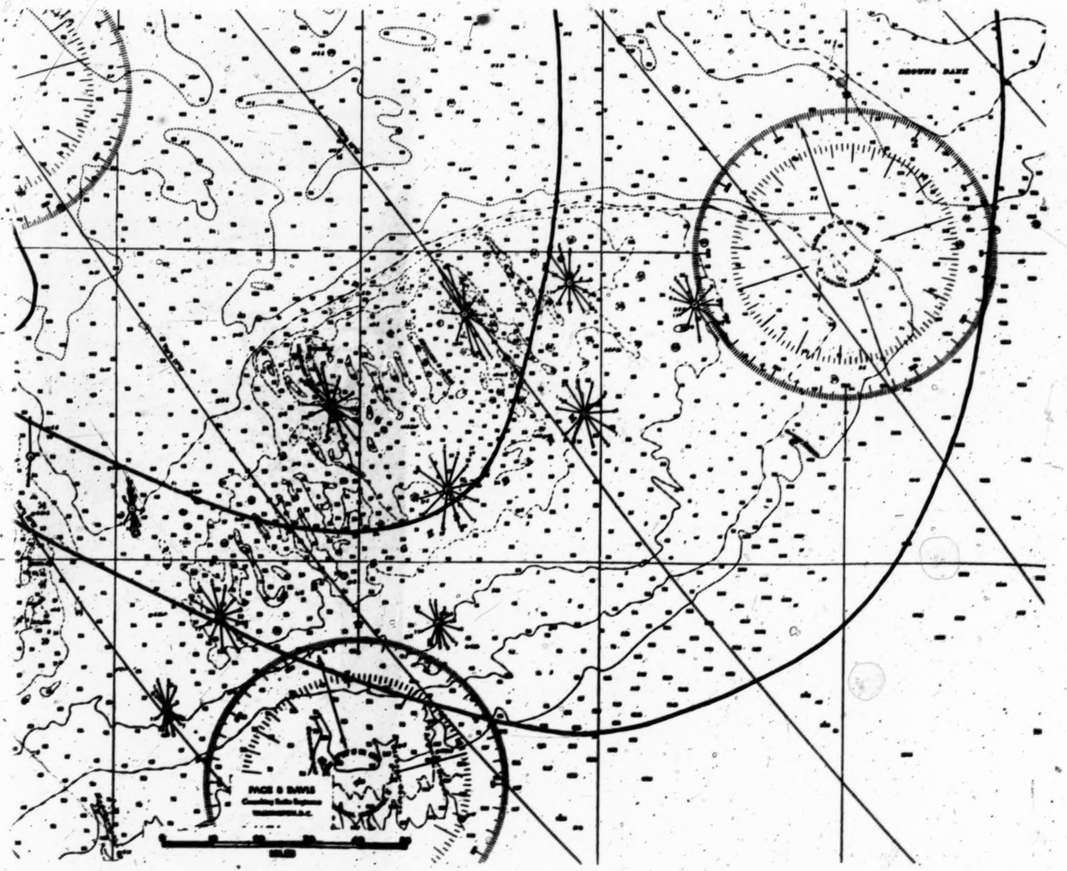
~~Appellant's Ex. 23~~
Intervenor's Ex. 23.



~~Appellant's Ex. 23~~
Intervenor's Ex. 23.



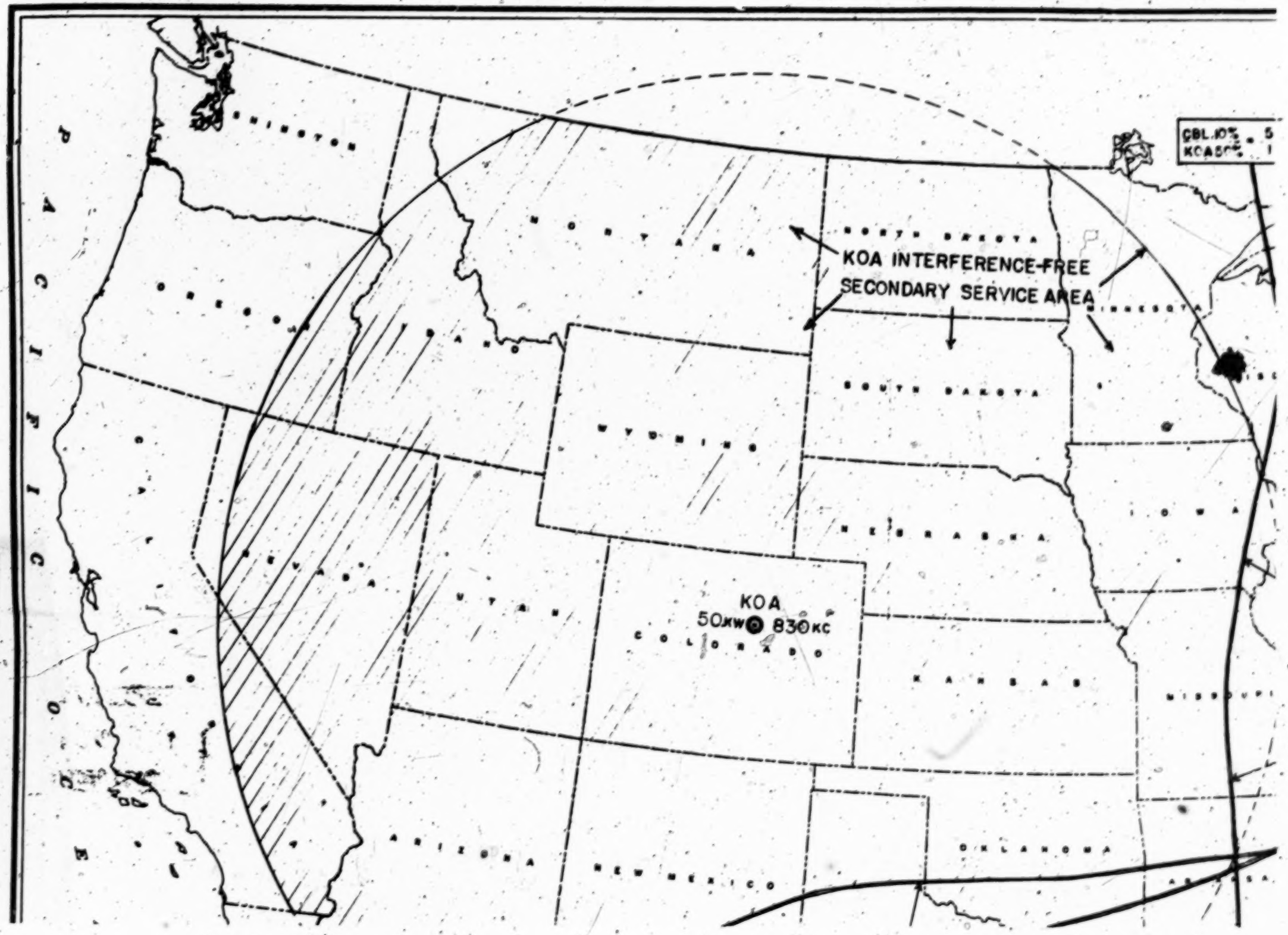

WHDH-7
MASSACHUSETTS
PAGE & DAVIS
Consulting Radio Engineers
Washington, D.C.


PAGE & DAVIS
Consulting Radio Engineers
Washington, D.C.

[redacted]

Intervenor's Ex. 24.

UNITED STATES
BASE MAP



[redacted]

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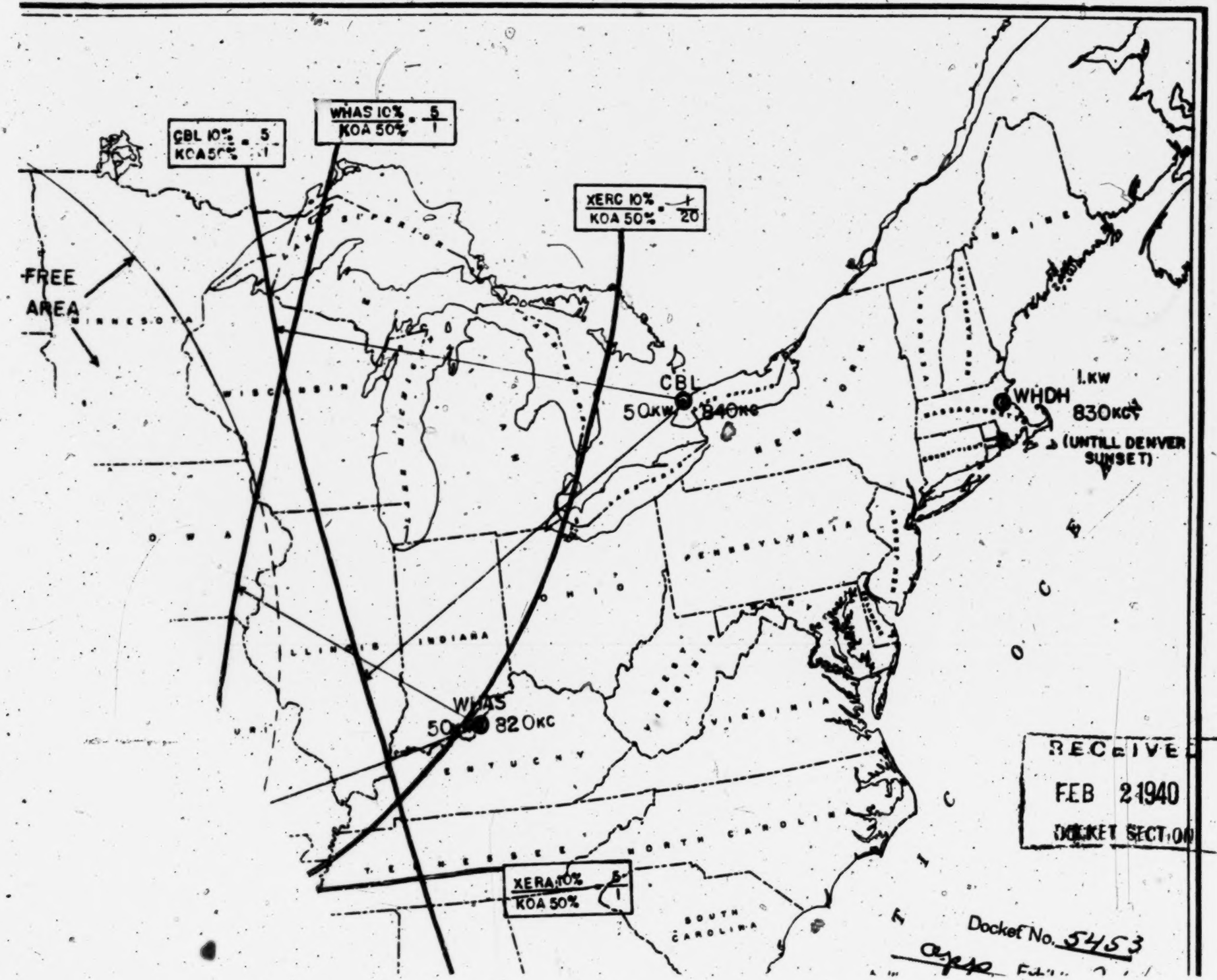
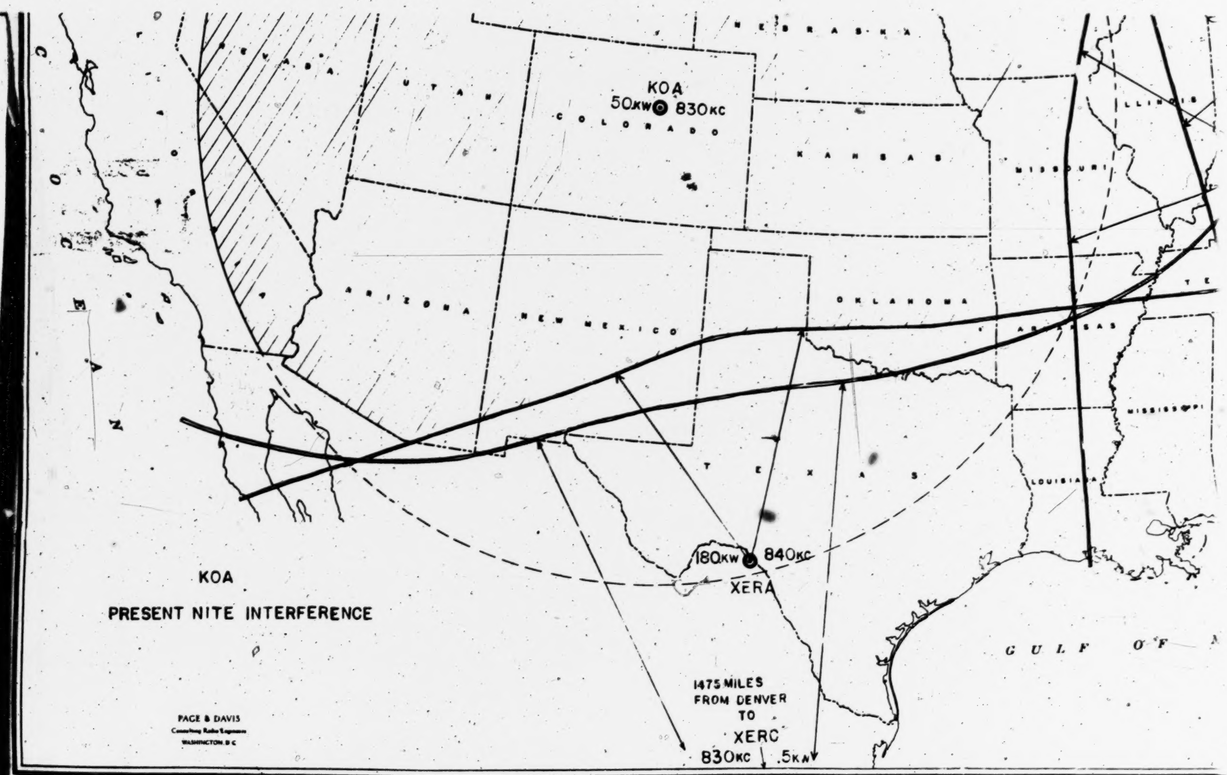
tervenor's Ex. 24.

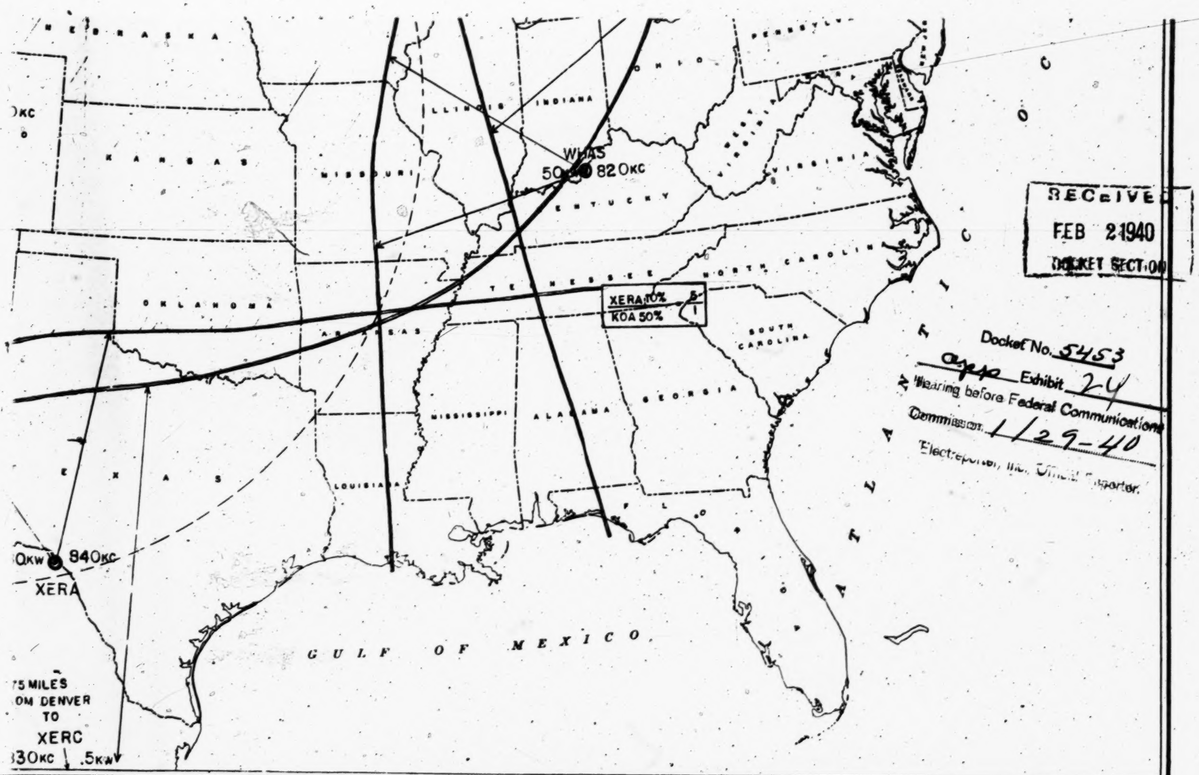
25

24

DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY







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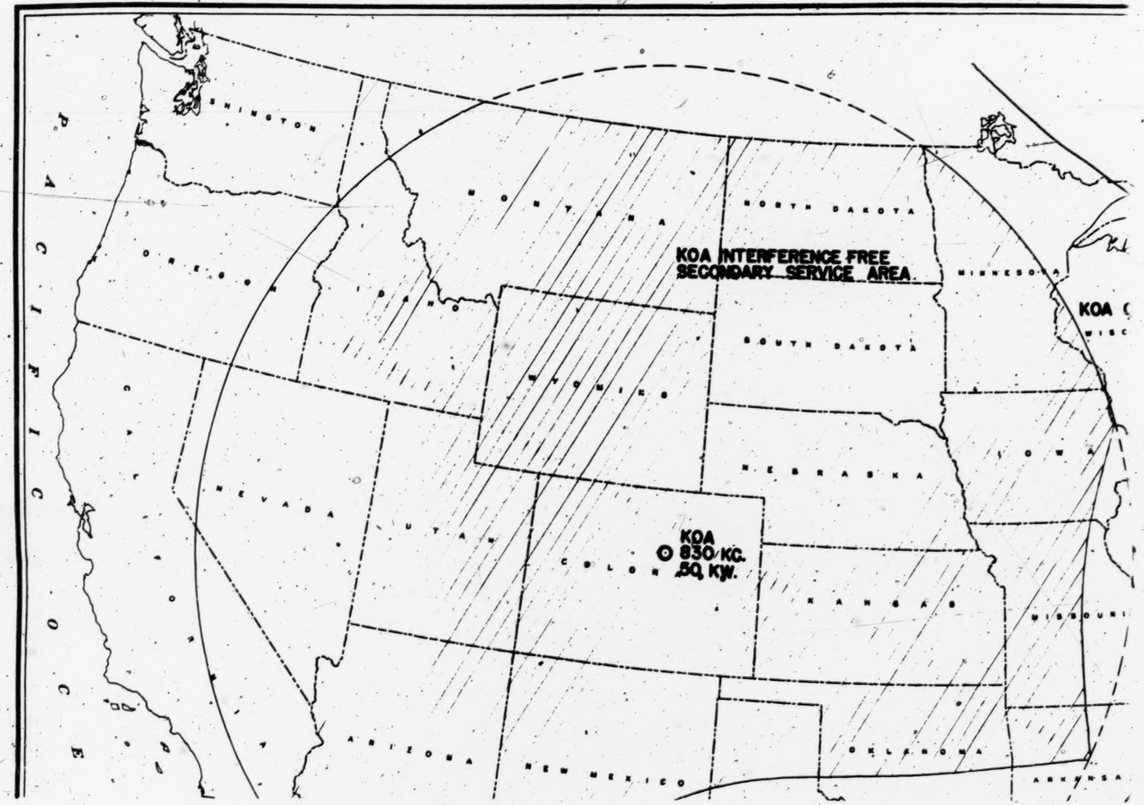
DOCKET SECTION

Docket No. 5453
Applicant Exhibit 24
Hearing before Federal Communications
Commission 1/29-40
Electrepeated by the Official Reporter.

~~Appellant's Ex. 28.~~

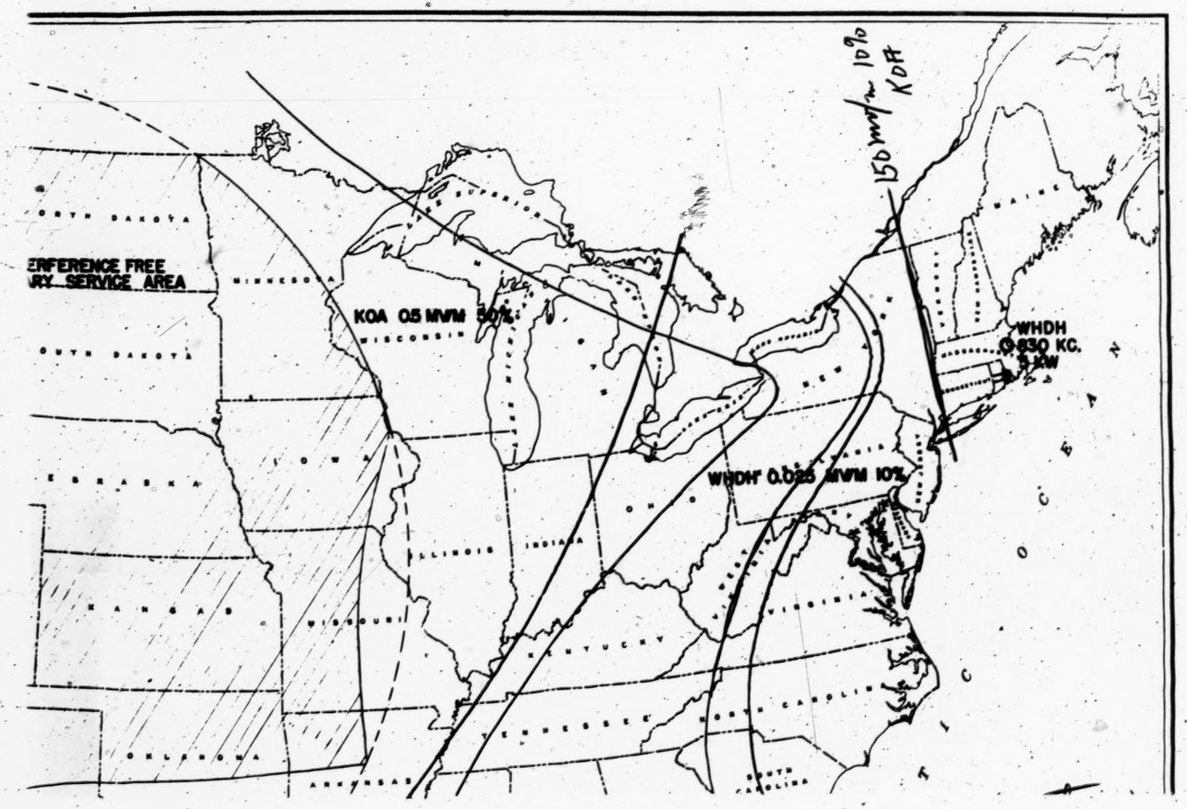
Intervenor's Ex. 28.

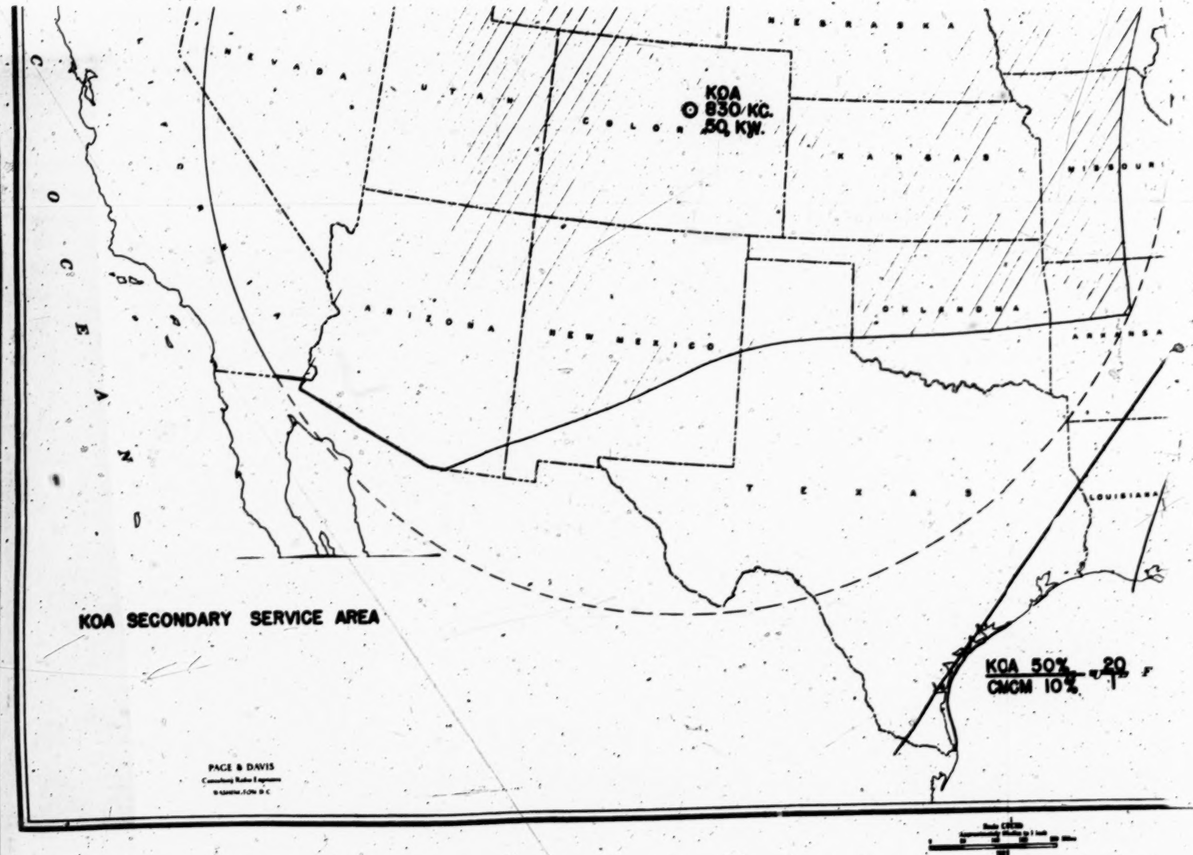
UNITED STATES
BASE MAP

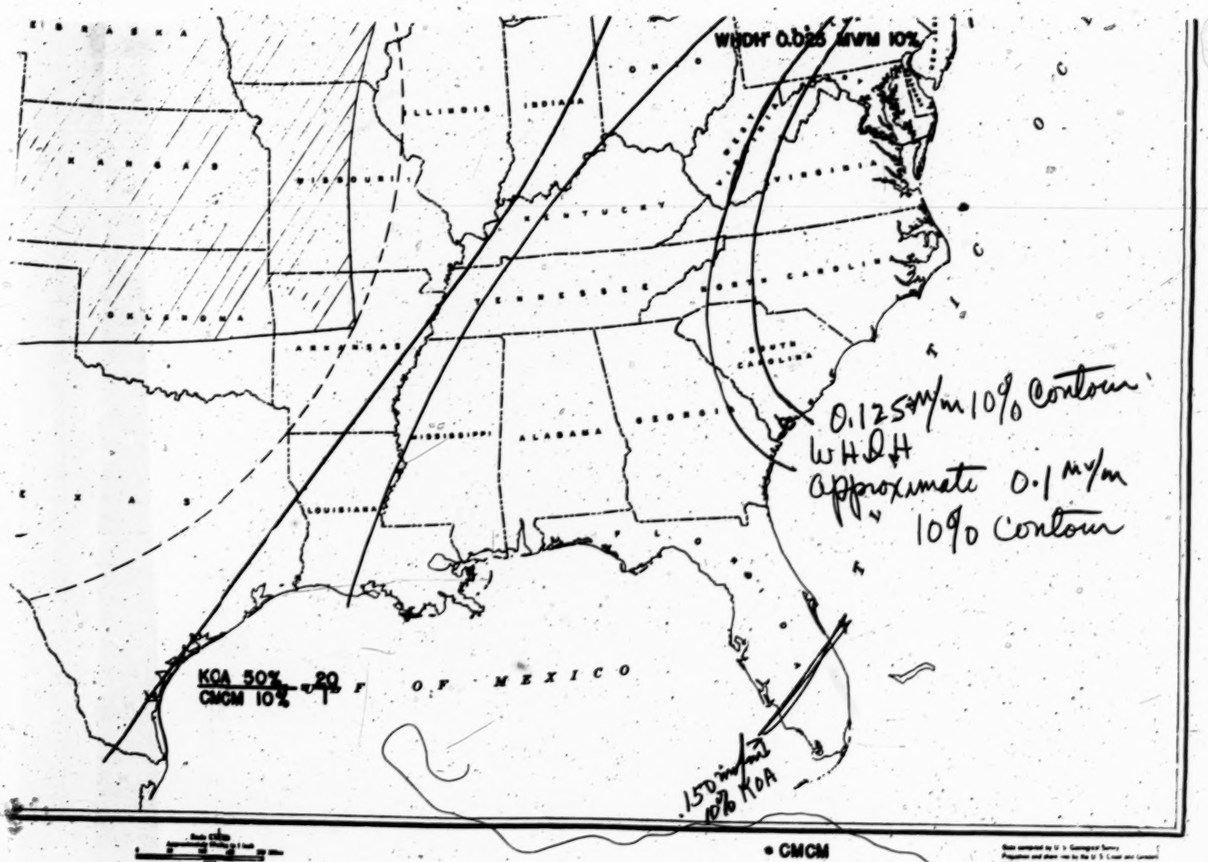


~~Appellant's Ex. 28.~~

Intervenor's Ex. 28.




KOA
830 KC.
50 KW.
KOA SECONDARY SERVICE AREA
KOA 50%
CMCM 10%
PAGE & DAVIS


WHDH 0.025 MVM 10%
0.125 mv/m 10% Contour
WHDH
Approximate 0.1 mv/m
10% Contour
KOA 50%
CMCM 10%
OF MEXICO
150 miles
10% KOA
• CMCM

1. Operating as proposed during the daytime, Station WHDH would increase the number of persons receiving satisfactory primary service from Station WHDH from 2,472,000 to 3,093,000, or a net increase of 621,000 people. During the nighttime, Station WHDH would render a new primary service to 2,285,700 people. Of the 2,307,897 people residing within the Boston Metropolitan Area, 2,185,000, or 94.9 per cent, would be able to receive satisfactory interference-free service from WHDH at night. (Ex. 21, 22) The proposed operation would furnish a signal to the entire business district of Boston having a value of 25 mv/m or more. (T. 64) [R. 133][1]

2. In addition to the increase in service to land population the proposed operation of Station WHDH would very substantially extend the daytime coverage of WHDH over the fishing banks situated off the New England Coast. Nighttime service to these fishing banks, hitherto unavailable to them from WHDH after sunset at Denver, would also result from the operation proposed. (Ex. No. 23) [R. 449]

3. The granting of the instant application will increase the number of hours during which WHDH may operate between present sign-off and midnight by a minimum of 2½ hours during the summer months and a maximum of 5½ hours during the winter months. (Ex. No. 7) [R. 412]

4. Station WEEU operates on the frequency 830 kc with 1 kw power, daytime only, at Reading, Pennsylvania. No operation is conducted by this station after sunset at Reading, Pennsylvania. The simultaneous operation of

483 WHDH (as proposed) and Station WEEU would not

[1] The reference "(T. 64)" is to the original transcript of testimony filed with the Commission. All succeeding references similarly made are to the original transcript. The reference "[R. 33]" is to this Court's record as paginated by this Court. All succeeding references similarly made are to this Court's pagination of its own record. The Court Record pagination has been added so that reference to the actual testimony on which the findings are predicated may be found with a maximum of convenience.

result in objectionable interference within the normally protected contours (0.5 mv/m during the daytime) of either station. (Ex. Nos. 1, 2, 3, 4, 8, 9, 17, 18; T. 45, 46, 203) [R. 397, 399, 406, 407, 414, 416, 432, 434; R. 214, 215, 374]

5. Station WABC operates on the frequency 860 kc with 50 kilowatts power unlimited time, at New York, New York. The proposed operation of Station WHDH would not cause objectionable interference to the operation of Station WABC at any point where Station WABC now renders satisfactory service. The proposed operation of Station WHDH would not receive objectionable interference from the operation of Station WABC within the normally-protected contours of the proposed operation of Station WHDH. (T. 46, 47) [R. 215, 216]

6. Station WRUF is located at Gainesville, Florida, and operates on the frequency 830 kc with 5 kilowatt power until sunset at Denver, Colorado. The simultaneous operation of Station WHDH (as proposed) and Station WRUF would not result in objectionable interference during the daytime within the normally-protected contours of either station. Under the Standards of the Commission, each of these stations are entitled to protection at night within their 2.5 mv/m ground-wave contours. The WHDH directional antenna system will be employed during evening hours beginning at sunset at Gainesville, Florida. (T. 57, 58) [R. 226, 227] At the second hour after sunset at Gainesville, Florida, which is the approximate time that Station WRUF signs off, the proposed operation of Station WHDH would not cause objectionable interference within the 1.75 mv/m ground-wave contour of Station WRUF, nor would Station WRUF cause objectionable interference within the 2.5 mv/m ground-wave contour of the proposed operation of Station WHDH. Inasmuch as Station WRUF signs off at Denver sunset, the time that the operation of Station KOA becomes a factor in the nighttime interference to the proposed operation of Station WHDH,

484

the root-sum-square method of computing interference is not applicable in computing the possible nighttime interference to the proposed operation of Station WHDH. (T. 57-59) [R. 226-228]

7. Station KOA is located at Denver, Colorado, and operates on the frequency 830 kc with 50 kilowatts power, unlimited time. The simultaneous operation of Station WHDH (as proposed) and Station KOA would not result, during the daytime, in objectionable interference within the normally-protected contours of either station. Station KOA would not cause objectionable interference, during the nighttime, within the normally-protected contour of the proposed operation of Station WHDH. (T. 59; Ex. No. 20) [R. 228] The proposed operation of Station WHDH would not cause objectionable interference, during the nighttime, within the 500 mv/m-50 per cent-sky-wave contour of Station KOA, (T. 79; Ex. No. 25) [R. 248; R. 446] nor would it cause interference at any point in the United States where Station KOA now has a signal that is free from objectionable interference from domestic and foreign stations operating on 830 kc or on its adjacent channels. The interference now caused to Station KOA by the present operation of these stations, operating on the same or adjacent frequencies, now imposes a much greater limitation upon the interference-free service area of KOA than would the proposed operation of Station WHDH. (T. 68-76, 120-121, 129-131, 218-221; Ex. No. 24) [R. 237-245, 291-292, 300-302, 389-392; R. 450]

8. Station KOA is a Class I station and is the dominant station operating on the frequency 830 kc, which
485 frequency is one of the 26 cleared-channel frequencies reserved by the Rules and Regulations of the Commission for the exclusive nighttime (*i.e.*, after sunset at the location of the dominant stations) use of the dominant stations. This complete exclusivity at night, and lack of exclusivity during daytime, results from the fact that at nigh the phenomena of sky-wave transmission exists,

whereas in the daytime it is non-existent. At no point does the sky-wave signal of these 50-kilowatt stations exceed, for 50 per cent or more of the time, the value of 1.3 mv/m. (T. 177) [R. 348] While Class I stations are designed to serve urban and rural areas, the exclusivity of their operation at night is not occasioned by demands for urban service, but by demands for rural service, inasmuch as urban areas can only be satisfactorily served by signals having a strength of at least 2.0 to 50.0 mv/m. No class of cleared-channed station furnishes a sky-wave signal approximating these values. (T. 177) [R. 348]

9. Sky-wave transmission is based upon the reflection of transmitted signals from some ionized layer in the upper atmosphere and returned to the ground at a point remote from the antenna of the station. This phenomena is only effective during the hours after sunset and before sunrise. The intensities of these signals vary from moment to moment, hour to hour, day to day, week to week, month to month, and year to year with changes in propagation conditions resulting principally from changes in the solar cycle. In general, when sky-wave transmissions are poor on one frequency for any extended period of time, a similar condition is observed on all of the frequencies in the broadcast band. Variations from day to day and season to season are, in general, considerably larger
486 than the variations from moment to moment. For determining the average strength of a sky-wave signal, the Commission has issued certain curves, which were based on studies made by the Commission. At any given instant the strength of any given sky-wave signal may vary widely from the values indicated by the said curves. However, the Commission requires the use of these curves as the best guide now available on the performance and characteristics of a sky-wave signal. T. 167-170) [R. 338-341] These curves were used by applicant's expert witness in computing the service and interference resulting from such sky-wave signals as are pertinent to the instant proceedings.

For determining the *service* rendered by a sky-wave signal the Commission, in its Standards, has specified the use of that value exceeded by the signal 50 per cent of the time. For determining the *interference* caused by a sky-wave signal the Commission, in its Standards, has specified the use of that value exceeded by the signal 10 per cent of the time. In determining the service rendered by, and interference caused by, such sky-wave signals as are pertinent to this proceeding, the applicant's expert witness employed these specified values. (Ex. 24; T. 68-74.) [R. 450; R. 237-243]

10. Whether sky-wave signals can be satisfactorily received by a listener depends upon the ability of the signal to overcome the interfering signals of other radio stations and the electrical disturbances caused by man-made electrical apparatus and natural electrical phenomena. (T. 175). [R. 346]

11. In the eastern part of the United States, without regard to other electrical disturbances, the sky-wave signals of KOA now lack the ability to overcome the objec-
487 tionable interference caused by the present operation of Radio Stations XERC, CMHI, XERA, CBL, and WHAS. One or more of these stations now completely prevent the interference-free reception of KOA signals by any listener residing east of the Mississippi River (Ex. No. 24; T. 68-77, 120-121, 129-131, 218, 219). [R. 450; R. 237-246, 291-292, 300-302, 389, 390]

12. Station XERC now operates with a power of 500 w. on the same frequency as KOA (830 kc) at Mexico City, D. F., which is 1475 miles distant from Denver, Colorado. This station causes objectionable interference to Station KOA south and east of a curved line commencing on the west at the southwestern corner of New Mexico and running in a northeasterly direction through northern Texas, southern Oklahoma, the middle of Arkansas, northwestern Tennessee, western Kentucky, southeastern Indiana, northwest-

ern Ohio, to the western tip of Lake Erie. This objectionable interference exists in all of the New England and the Middle Atlantic States, as well as in Ohio, Maryland, District of Columbia, Virginia, West Virginia, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, southern New Mexico, southern Arkansas and in all but the panhandle of Texas. (Ex. No. 24; T. 70) [R. 450; R. 239] If literal effect is eventually given to the present terms of the North American Regional Broadcasting Agreement (hereinafter referred to as the Havana Treaty), which becomes effective within the next year, Station XERC will cease to be a source of interference to Station KOA. However, as long as this or similar interference to KOA persists, it is the opinion of the expert witness of the Commission, that it would be good engineering practice to permit such operation as that proposed herein by Station WHDH. (T. 218-219.) [R. 389-390]

488 13. Station CMHI now operates with a power of 5 kw on the same frequency as KOA (830 kc) at Santa Clara, Cuba. This station now causes objectionable interference to Station KOA in the entire area of the United States lying to the east of the Mississippi River. If literal effect is eventually given to the Havana Treaty, Station CMHI will cease to be a source of objectionable interference to Station KOA. However, as long as this or similar interference to KOA persists, it is the opinion of the expert witness of the Commission that it would be good engineering practice to permit such operation as that proposed herein by Station WHDH. (T. 218-219.) [R. 389-390]

14. Station CMCM now operates on the frequency 850 kc, with 200 watts power, at Havana, Cuba. The frequency 850 kc is the frequency to which, according to the Commission's announcement, Station KOA will be assigned after the effective date of the Havana Treaty. Should Stations CMCM and KOA operate simultaneously on the frequency 850 kc, with their present power, KOA would receive ob-

jectionable interference in all parts of the United States where the proposed operation of Station WHDH could possibly be considered a source of objectionable interference to the signal of Station KOA. Should the above-mentioned interference between Stations KOA and CMCM eventuate, it is the opinion of the expert witness of the Commission, that it would be good engineering practice to permit such operation as is proposed herein by Station WHDH. (Ex. No. 28; T. 120-121, 129-131, 219-221). [R. 455; R. 291--292, 300-302, 390-392]

15. Station WHAS is a Class I station located at Louisville, Ky., and operates on the frequency 820 kc, (just
489 10 kc removed from the frequency 830 kc assigned to KOA) with power of 50 kw, unlimited time. The frequency 820 kc is reserved by the Rules and Regulations of the Commission for the exclusive nighttime use of Station WHAS. Station CBL is a Class I station located at Toronto, Canada, and operates on the frequency 840 kc (just 10 kc removed from the frequency 830 kc assigned to KOA) with power of 50 kw, unlimited time. Since each of these adjacent-channel stations, with respect to KOA, maintain the same relative frequency position under the allocations provided in the Havana Treaty, interference conditions now caused by them to KOA wil not be mitigated by the effectuation of the Havana Treaty. (T. 70, 71, 77.) [R. 239, 240, 246].

16. In determining the interference that exists between stations operating on adjacent channels, one of the most important factors is the selectivity of receivers, *i.e.*, the ability of receivers to tune out an undesired signal on an adjacent channel and to receive the desired signal without objectionable interference from the undesired station. (T. 172-173.) [R. 343-344] The selectivity of modern receivers cannot be further improved without losses in fidelity, *i.e.*, without losses in the ability of the receivers to reproduce the sound-frequencies. It is a matter of common knowledge that receivers employing push-button tuning have been

widely introduced to the market since the year 1936. Push-button tuning does not permit of the accurate and precise tuning necessary to obtain the maximum selectivity from receiving sets. (T. 88.) [R. 257] During the year 1936 the Commission conducted extensive tests on the selectivity of the receivers then in use and determined that 85 to 90 per cent of such receivers could tune out an undesired
490 sky-wave signal from an adjacent channel 10 kc removed that had a strength, for 10 per cent of the time, up to five times the strength maintained by the desired ground-wave signal for 100 per cent of the time. While 50 per cent of the receivers were found to have the ability, when accurately and precisely tuned manually, to tune out such an undesired signal having a strength up to 10 times that of such a desired signal, the Commission based its published Standards for determining objectionable interferences upon the performance of 85 to 90 per cent of the receivers then in use. To determine the objectionable interference that will result to a *desired ground wave*, present 100 per cent of the time, from an undesired sky-wave 10 kc removed and present only 10 per cent of the time, the Commission in its Standards prescribes the use of the ratio of 1 to 5. (T. 172-174, 217.) [R. 343-345, 388] The Standards of the Commission do not prescribe the ratio to be employed in determining interference to a *desired sky-wave* from an undesired sky-wave on an adjacent channel. This does not mean that interference does not exist, but that even though it does exist, the Commission's Rules, Regulations and Standards do not purpose to eliminate it. The listener is subjected to the interference, nevertheless. (T. 82.) [R. 251]

17. The expert witness of the applicant, in determining the objectionable interference caused to Station KOA by Stations CBL and WHAS, employed the ratio of 1 to 5, *i.e.*, it was determined that objectionable interference is caused to KOA wherever the sky-wave signal of KOA does not have a strength, for 50 per cent of the time, that is 1/5 of

the strength maintained by CBL and WHAS for 10 per cent of the time. The Commission in its Standards used this 1 to 5 ratio to determine the ability of a ground-wave
491 signal, that is steady and present as a source of service for 100 per cent of the time, to overcome an undesired sky-wave signal, unsteady and intermittent in nature, that is present as a source of interference during only 10 per cent of the time that the desired signal is present as a source of service. The applicant in this case used this 1 to 5 ratio to determine the ability of a desired sky-wave signal, that is unsteady and present as a source of service only 50 per cent of the time, to overcome an undesired sky-wave signal that is present as a source of interference during 10 per cent of the entire time or 20 per cent of the time that the desired signal is present as a source of service. (Tr. 89; Ex. No. 24.) [R. 258; R. 450]

18. On the basis of this ratio of 1 to 5 of KOA's 50 per cent sky-wave signal value *versus* WHAS's 10 per cent sky-wave signal value, Station WHAS causes objectionable interference to signals of Station KOA in all parts of the United States east of a line commencing on the north at the northwestern tip of Michigan and running in a direction slightly west of south to the approximate center of Missouri, thence in a southerly direction through the eastern portion of Arkansas and Louisiana to the Gulf of Mexico. This objectionable interference exists in all of the New England and the Middle Atlantic States, as well as in Maryland, District of Columbia, West Virginia, Virginia, North Carolina, South Carolina, Georgia, Alabama, Florida, Mississippi, Tennessee, Kentucky, Ohio, Indiana, Michigan, Illinois, the eastern half of Wisconsin, and the eastern portions of Iowa, Missouri, Arkansas, and Louisiana. (Ex. No. 24; T. 70-71.) [R. 450; R. 239-240] Inasmuch as Stations WHAS and KOA maintain this same frequency juxtaposition, under the Havana Treaty changes published
492 by the Commission, this objectionable interference will not be eliminated by the effectuation of the terms

of that Treaty. (T. 77.) [R. 246] Increases in the signal strengths of KOA and WHAS, through increased power or technical advances, would not change this interference situation. (T. 93.) [R. 262] This objectionable interference to the signal of Station KOA by the signals from Station WHAS now exists in all parts of the United States where the proposed operation of Station WHDH could possibly be considered a source of interference to the signal of Station KOA. (Ex. No. 24; F. C. C. Ex. 1.) [R. 450; 465]

19. On the basis of this same ratio of 1 to 5 of KOA's 50 per cent sky-wave signal-value *versus* CBL's 10 per cent sky-wave signal-value, Station CBL causes objectionable interference to the signals of Station KOA in all parts of the United States east of a line commencing at the northeastern tip of Minnesota and running in a direction slightly east of south through the center of Wisconsin, the eastern one-third of Illinois, the southwest corner of Kentucky, the western one-fourth of Tennessee, the center of Alabama, the northwestern part of upper Florida to the Gulf of Mexico. This objectionable interference exists in all of the New England and the Middle Atlantic States as well as in Maryland, District of Columbia, Virginia, West Virginia, Ohio, Indiana, North Carolina, South Carolina, Georgia, the eastern one-half of Wisconsin, the eastern one-third of Illinois, the eastern three-fourths of Kentucky and Tennessee, the eastern one-half of Alabama, and all but the northwestern tip of Florida. (Ex. No. 24; T. 71.) [R. 450; R. 240] Inasmuch as Stations CBL and KOA maintain this same frequency juxtaposition, under the Havana Treaty assignments, this objectionable interference will not be
493 eliminated by the effectuation of the terms of that Treaty. (T. 77.) [R. 246] Increases in the signal strengths of KOA and CBL, would not change this interference situation. (T. 93.) [R. 262] With the exception the western one-fourth of Kentucky and Tennessee, the western one-half of Alabama, and the state of Mississippi, this objectionable interference to the signal of Station KOA by the

signals from Station CBL now exists in all parts of the United States where the proposed operation of Station WHDH could possibly be considered a source of interference to the signal of Station KOA. As stated in paragraph 17, above, in the aforesaid portions of Kentucky, Tennessee, Alabama and Mississippi where CBL is *not* a source of objectionable interference, Station WHAS now *does* cause objectionable interference to the signal of Station KOA.

20. Station XERA operates at Villa Acuna, Mexico, with power of 180 kw on the frequency 840 kc, which frequency is just 10 kc removed from the frequency of Station KOA. On the basis of the ratio of 1 to 5 of KOA's 50 per cent-sky-wave signal-value *versus* XERA's 10 per cent-sky-wave signal-value, Station XERA causes objectionable interference south of a line commencing on the west at the southwestern corner of Arizona and running in a direction somewhat north of east to the approximate center of the State of Tennessee. This objectionable interference exists throughout the States of Georgia, Florida, Alabama, Mississippi, Louisiana, in all but the panhandle of Texas, and in the southwestern one-fourth of New Mexico, the southern one-third of Oklahoma and Tennessee, and the southern two-thirds of Arkansas. This interference might be eliminated by the effectuation of the Havana Treaty. (Ex. No. 24; T. 69.) [R. 450; R. 238]

494 21. From the foregoing paragraphs 10 to 20, inclusive, it is clear that the present sky-wave signals of Station KOA do not have the ability to overcome objectionable interference from existing stations and that, while with the effectuation of the Havana Treaty, there might be a reduction in the *number* of stations that now cause objectionable interference to Station KOA, very substantial objectionable interference will still exist from at least two stations in the areas of the United States within which the proposed operation of Station WHDH could possibly be considered as a source of interference. Furthermore, the useability of the sky-wave service of Station KOA is de-

pendent upon something more than its freedom from objectionable interference from existing radio stations. To be useable by a listener, the KOA signals must also be capable of overcoming local noise-levels, *i. e.*, the electrical disturbances caused by man-made electrical apparatus and natural electrical phenomena. (T. 175.) [R. 346]

22. It is the opinion of the applicant's expert witness that listeners residing in the areas in which the sky-wave signals of Station KOA do not reach a value of at least 500 uv/m for 50 per cent of the time, do not receive a useable signal from Station KOA, because of the inability of the KOA signal to overcome local noise-levels, as well as its inability to overcome objectionable interference from existing stations. (Ex. No. 24, 25; T. 81-85.) [R. 450, ; R. 250-254] At no place within the area in which WHDH could possibly be considered a source of interference to Station KOA does Station KOA render a signal in excess of 330 uv/m for 50 per cent of the time. (F. C. C. Ex. 1; T. 194.) [R. 465; R. 365] In the areas along the Atlantic Coast the KOA signal has a value of much less than 100 uv/m
495 for 50 per cent of the time. (T. 80.) [R. 249] In all of these areas the KOA signal may reach a zero value for a very substantial portion of the time. (T. 83.) [R. 252]

23. It is the opinion of the expert witness of the Commission that, under average conditions of rural noise-level, a sky-wave signal having a strength of less than 200 uv/m for 50 per cent of the time is not capable of overcoming rural noise-levels. (T. 182-185.) [R. 353-356] Station KOA does not furnish sky-wave signals having this value in any part of the New England or the Middle Atlantic States, nor in Ohio, West Virginia, Maryland, District of Columbia, Virginia, North Carolina, South Carolina, Georgia, and Florida, nor in four-fifths of Alabama, the southeastern parts of Louisiana and Mississippi, and the eastern one-half of Michigan. In the area in which it might possibly be considered that the proposed operation of Station

WHDH would cause interference, only the northeastern corner of Alabama, the western one-fifth of Tennessee and Kentucky, the central portions of Mississippi and Louisiana, the very northeastern tips of Minnesota and Wisconsin, and the western one-half of Michigan receives a signal of 200 uv/m for 50 per cent of the time. (F. C. C. Ex. No. 1.) However, in each of these latter areas, even if it is conceded that the signals of KOA can overcome rural noise-levels, it definitely cannot overcome the objectionable interference now caused by Stations XERC, XERA, CMHI, WHAS, and CBL. (Ex. No. 24; T. 68-76, 120-121, 129-131, 218-221.) [R. 450; R. 237-245, 291-292, 300-302, 389-392]

4. The disability of KOA's signal in overcoming rural noise-levels in eastern United States might be partially cured by an increase in the power of KOA to 500 kw, or more, or by technical advances in the operation of the
496 Station. However, the objectionable interference caused by Stations WHAS and CBL would remain the same if the entirely reasonable assumption is indulged that these latter two stations will make similar improvements in their signal strength. Furthermore, the co-channel interference from Stations XERC and CMHI could not possibly be overcome in such a manner. (T. 85-86.), [R. 254-256] Even though Station KOA should increase its power to 500 kw, it could not possibly render a signal to the east coast of the United States having a value of 500 uv/m for 50 per cent of the time. (T. 111.) [R. 282] This latter value of signal is necessary, in the opinion of the applicant's expert witness, to render a useable secondary service to rural areas. (T. 81-85.) [R. 250-254]

25. Should an increase in power later be authorized to Station KOA, which increase would require an amendment to the Commission's Rules and Regulations, it could be accomplished without increasing the interference-limitation (2.5 mv/m groundwave) to the proposed operation of Station WHDH. This could be done by the employment of a

directional antenna at Station KOA that would restrict the radiation to 50 kw power over a narrow angle in the direction of Boston. The signal intensity of KOA would thereby be increased in all directions from Denver, except towards Boston. In such a manner Station KOA could extend its 500 uv/m 50 per cent-sky-wave contour to include all of the States of Washington, Oregon, California, and Texas. The value of the intensity of KOA's sky-wave signal would be improved for rural listeners in these states as well as in Idaho, Montana, Nevada, Arizona, and New Mexico. Even without the proposed operation of WHDH, the signal of KOA could not be appreciably improved for the re-
497 ception of rural listeners residing in eastern United States because of the objectionable interference from other existing stations. The states of Washington, Oregon, Idaho, and Montana receive less secondary service, both from the standpoint of intensity and number of signals available, than any other section of the United States. Because of the relative concentration of cleared-channel facilities in the eastern one-half of the United States, rural listeners in eastern United States have available to them a far greater number of secondary services than the rural listeners in the western states, particularly the states of the Pacific Northwest. (T. 90-95; Ex. No. 24.) [R. 259-264; R. 450]

26. Thus far, in analyzing the service rendered by Station KOA to the eastern part of the United States, these findings have been devoted to an analysis of KOA service purely from the standpoint of electrical availability. The *usefulness* of the signal of any station to a listener depends upon more than its mere electrical availability, inasmuch as a signal electrically available may transmit programs for which the listener has no need, interest, or convenience. In this connection, Station KOA is licensed to the National Broadcasting Co. and is a major outlet for the Red Network of the National Broadcasting Co. (T. 98; Ex. No. 26, 29.) [R. 267; R. 452, 457] In addition to numerous primary-

service facilities, eleven secondary-service facilities, each of which furnishes sky-wave signals to the eastern half of the United States having a value equal to or greater than the value of the sky-wave signals of KOA in the same area, are affiliated with the Red Network of the National Broadcasting Co. Four of these Stations are Class I-B stations and receive protection from interference out to their
498 respective 500 uv/m-50 per cent-sky-wave contours. Seven are of the same classification as Station KOA (*i.e.* Class I-A) and have exclusive use of their respective frequencies during their nighttime operation. All but one of these eleven secondary-service facilities operate with a power of 50 kw. If there is a public necessity, convenience, or interest in improving Red Network signals in the eastern half of the United States, an improvement of the signal strength of any one or all of these eleven facilities would accomplish a greater improvement in service to rural listeners in this area than improvement in the signal strength of Station KOA. (T. 111-115.) [R. 282-286]

27. Inasmuch as rural listeners are substantially dependent upon sky-wave signals for service, which signals vary considerably in strength during any given period, two signals for each program or type of program are desirable to furnish continuous service. (T. 116.) [R. 287] With the exception of Florida, every rural listener residing in the eastern one-half of the United States is able to receive at least two and as many as six sky-wave signals, each with a value of 500 uv/m for 50 per cent or more of the time, from the Red Network Stations of the National Broadcasting Co. Station KOA could not furnish a 500 uv/m for 50 per cent of the time to the State of Florida even if it increased its power to 500 kw and, further, could not render interference-free service to Florida because of the objectionable interference caused by existing stations. (Ex. No. 26; T. 115-119.) [R. 452; R. 286-290]

28. In that area in which, were it not for objectionable interference from existing stations, Station KOA would ren-

der a signal which the Commission's expert witness regards as useable by rural listeners (northeastern corner of
499 Alabama, the western one-fifth of Tennessee and Kentucky, the central portions of Mississippi and Louisiana, the very northeastern tips of Minnesota and Wisconsin, and the western one-half of Michigan—See paragraph 23, above) there are at least six and as many as eight sky-wave signals available from the secondary-service facilities of the Red Network, of the National Broadcasting Co., each of which has a value equal to or greater than the value of the KOA sky-wave signal in the same areas. These stations are WHO, WMAQ, WFAA-WBAP, WOAI, WSB, WTAM, WEAF, and WGY. (Ex. Nos. 24, 25, 26; T. 68-76, 114, 120-121, 129-131, 218-221.) [R. 450, 451, 452; R. 237-245, 285, 291-292, 300-302, 389-392]

29. During the week of October 22 to 28, 1939, inclusive, 73.2 per cent of KOA's programs were duplicated by as many as sixteen secondary-service facilities located at points east of a north-and-south line through Denver. Many of these stations are located east of the Mississippi River and furnish a much higher-grade electrical service to eastern United States than does KOA. The KOA programs that were not broadcast by any of these other secondary service facilities were news programs, programs of Denver University, musical programs, recorded music and programs of local interest to Denver. (Ex. No. 29; T. 157-161.) [R. 457; R. 328-332] It is a matter of common knowledge that almost every radiobroadcast station in the United States, including those located east of the Mississippi River, conduct frequent news-broadcasts daily and undoubtedly many of them subscribe to the same national and international news-services as does Station KOA. Collectively, they undoubtedly make use of all the news sources that are available to KOA, except the sources from which KOA receives news local to Denver. It is also a matter of
500 common knowledge that many of the stations located east of the Mississippi River make their facilities

regularly available for the broadcasts of institutions of higher learning. It is likewise of common knowledge that the two largest talent-centers in the United States are located east of the Mississippi River and that the musical productions of this talent finds almost continuous expression over radio stations located in the eastern half of the United States.

501 *Proposed Conclusions.*

1. The operation of Station WHDH, as proposed in the instant application, would not cause objectionable interference to the interference-free service now satisfactorily received by radio listeners in the United States from Stations KOA, WRUF, WEEU, and WABC; nor would these latter four stations cause objectionable interference to the interference-free service that radio listeners, under the Commission's Standards of Good Engineering Practice, should receive from the proposed operation of Station WHDH.

2. The frequency 830 kc, involved in this application, is one of the twenty-six cleared-channel frequencies, which, under the Rules and Regulations of the Commission, are reserved for the exclusive nighttime use of the Class I stations assigned thereto, only one of which stations are assigned to each of the twenty-six frequencies. Class II stations are permitted to operate on these frequencies only during the time before sunset at the location of the Class I stations. The difference between the daytime and nighttime use of these frequencies is occasioned by the fact that during the nighttime both sky-wave and ground-wave signals exist as a serviceable medium of transmission, whereas, during the daytime only the ground-wave signal is present as a serviceable medium of transmission. A ground-wave signal exists, as a source of service or interference, in areas relatively close to the location of the transmitter. A sky-wave signal on the other hand exists, as a source of service or interference, in areas relatively far-distant from the location of the transmitter. The failure to assign Class II

stations to these twenty-six cleared-channel frequencies for operation after sunset at the Class I stations can only
502 be for the purpose of according interference protection to the sky-wave signals of the Class I stations.

3. Class I stations are designed to serve large urban centers and extended rural areas. The failure to allow duplicate nighttime operation on any of these frequencies, however, cannot be for the purpose of affording service to urban centers, inasmuch as a sky-wave signal never has sufficient strength to satisfactorily serve urban centers of population. Non-duplication at night, therefore, can be purposed only to afford service to listeners, residing in rural areas. The only listeners who could, by any stretch of the imagination, be harmed by the nighttime duplication on 830 kc, herein sought, are rural listeners.

4. Station KOA is the Class I station assigned to the frequency 830 kc and operates with 50 kw power at Denver, Colorado. It is licensed to the National Broadcasting Co. and is a major outlet of that Company's Red Network.

5. The *useability* of a signal to a listener depends upon its electrical availability; *i.e.*, upon the ability of that signal to overcome interfering signals from other radio stations and to overcome the disturbances caused by man-made electrical apparatus and natural electrical phenomena. The *usefulness* of a signal to a listener depends, in addition to its electrical availability, upon the need, convenience, or interest of the listener in the programs carried by that particular signal. *The facts adduced at the hearing on the instant application conclusively prove that, in the area where the proposed operation of Station WHDH could possibly be considered as a source of interference to Station KOA, the signal from KOA is not now electrically avail-*
503 *able, nor do the listeners residing in this area have any need, interest, or convenience for the programs of Station KOA. KOA is useless to them.*

6. The signals of Station KOA are not electrically available to listeners residing in that part of the United States where the proposed operation of Station WHDH could possibly be considered a source of interference, for the reason that the objectionable interference caused by Stations XERC, CMHI, XERA, CBL, and WHAS now impose a greater limitation upon the interference-free service of Station KOA than would the proposed operation of Station WHDH. The objectionable interference caused by Stations XERC, CMHI, and XERA might be eliminated by the effectuation of the pending Havana Treaty, but, *according to the Commission's Engineer,* as long as the present or similar objectionable interference persists it would be good engineering practice to permit such operation as is proposed by Station WHDH. The changes in frequency-assignment that will be made by Station KOA with the effectuation of the Havana Treaty, may give rise to objectionable interference from Station CMCM to such an extent that, *according to the Commission's engineer,* it would be good engineering practice to permit such operation as is herein proposed by Station WHDH. The objectionable interference now caused by Stations WHAS and CBL will not be eliminated by the effectuation of the Havana Treaty; which objectionable interference, in and of itself, now imposes a greater limitation upon the interference-free service area of Station KOA than would the proposed operation of Station WHDH. *No listeners in the United States who, either before or after the effectuation of the Havana Treaty, satis-*
504 *factorily receive interference-free service from Station KOA, would be deprived of that service by the proposed operation of Station WHDH.*

7. The signals of Station KOA are not electrically available to listeners residing in that part of the United States where the proposed operation of Station WHDH could possibly be considered as a source of interference, for the further reason that they do not have the ability in this area to overcome the electrical disturbances caused by man-made

electrical apparatus and natural electrical phenomena. If we indulge the assumption that the Commission may someday amend its present rules to allow Class I stations greater power than 50 kw and further assume that KOA will take advantage of the permitted increase in power, this inability to overcome local noise-levels might be eliminated in certain western parts of the area in question. However, if we indulge in such assumptions fairly, we must also assume that Stations CBL and WHAS, both Class I stations, will also increase their power, in which case, the present inability of Station KOA to overcome the objectionable interference of Stations CBL and WHAS would remain. *No reasonable assumption of forseeable future conditions can possibly support a prediction that KOA's signal might someday be electrically available to the listeners in the area in question.*

8. In addition to its lack of electrical availability to listeners residing in eastern United States, the listeners in that area have no need, interest, or convenience in the reception of the programs carried by the signals of Station KOA. With the exception of listeners residing in Florida, to whom the signals of KOA could not become available under any forseeable circumstance, every rural listener residing in eastern United States receives the programs of the Red Network of the National Broadcasting Company from at least two and as many as six Class I stations, each of which furnishes a better signal to these listeners than does KOA. Station KOA is licensed to the National Broadcasting Company and is a major outlet of that Company's Red Network. During an entire week in October of 1939, 73 per cent of KOA's programs were duplicated by as many as sixteen Class I stations that serve all or parts of the area in question with a signal equal to or better than that of Station KOA. The remaining 27 per cent of KOA's programs were devoted to news, music and to programs of a University local to Denver. These are common types of programs, having no unique value and are substantially duplicated as to type by every station licensed

to operate in eastern United States. There cannot possibly be any doubt that the talent available for the musical, news, and educational programs of many eastern stations compares favorably, qualitatively and quantitatively, with the talent available for the musical, news, and educational programs of Station KOA. From the foregoing it is manifest that *the signals of KOA are useless to listeners residing in the area in which the proposed operation of Station WHDH could possibly be considered as a source of interference, because the KOA signals are not electrically available and the listeners residing therein have no need, interest, or convenience for receiving the programs of Station KOA.*

9. *Should it be assumed that stations XERC, CMHI and XERA will cause no objectionable interference to Station KOA after the reallocations under the Havana Treaty and should we blindly ignore the objectionable interference that will persist, even after the Treaty, from Stations CBL and WHAS, there still remains certain unconquerable and insuperable facts. The KOA signal, according to the Commission's own engineer, cannot overcome rural noise-levels in any part of the theoretical WHDH interference-area, except in certain relatively small sections just east of the Mississippi River where there are at least six and as many as eight better sky-wave signals available from other secondary-service facilities of the Network with which KOA is affiliated. The applicants engineer testified that the KOA signal is impotent even in these small areas. Furthermore, in all of the United States east of the Mississippi River there is not a single listener who has any real need, convenience, or interest in the program service carried by the signal of KOA. Appendix A, hereof, forcefully and graphically demonstrates this condition and the futility of any hope of future service from Station KOA to the area in question, even though we ignore facts which are themselves decisive and controlling.*

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10. The Commission has uniformly held that the need, interest, or convenience of listeners is the principal criterion

in determining the public interest, convenience, and necessity in any broadcast matter pending before the Commission. *It is clear from the evidence adduced at the hearing on the instant application that no listeners could possibly benefit by the Commission's denial of the WHDH application, whereas, over two million listeners would benefit by the granting thereof. That the public interest, convenience, and necessity would be served by granting the instant application is clear and beyond all possible doubt.*

507 11. No future circumstances can reasonably be foreseen that might alter the public interest, convenience, and necessity in granting the application here in issue. However, even though by overtaxing the imagination one might conjure up future conditions that would render the KOA signal useful in eastern United States, the Commission is under no necessity of indulging in such dream-stuff. Licenses are only granted for terms of one year. The same public interest, convenience, and necessity that is the touchstone to the Commission's decision on an application for an original license or permit governs also the Commission's decision on applications for renewal of such licenses. Should any future conditions arise that would render it against the public interest for WHDH to continue its proposed operation, the Commission has the full power and the definite duty to deny the application of WHDH for renewal of license. Certainly, the problems of today and the immediate future are perplexing enough to occupy our whole attention, without unnecessarily attempting to deal with future conditions that are impossible to forsee and that would require the Commission, not to act as experts, but as clairvoyants.

12. Succinctly stated, any argument in favor of denying the WHDH application must argue for protecting "the little service that isn't there." That never will be there.

13. The Commission has promulgated Rules and Regulations which, if applied mechanically, do not permit the op-

eration proposed herein by Station WHDH. The applicant makes no argument that these Rules, in their general application, do or do not serve the public interest, con-
508 venience, or necessity. The Commission very properly, in its Bill of Particulars raised the question as to whether or not the Rules "properly interpreted and applied preclude the granting of the application."

14. The Rules of the Commission are merely implements or tools to be used to aid the Commission in accomplishing service to the public interest, convenience and necessity in deciding on the particular applications and matters coming before it. Surely, it would be highly improper for these tools to be used in injuring service to the public interest, convenience and necessity. To indulge in such improper use would render the rule unreasonable and a decision based on such improper use would be arbitrary and capricious. The oft-repeated statement of the Commission that its Rules must have flexibility in their application together with the multitude of instances where the Commission has refused to allow mere mechanical application of its Rules, is eloquent in its affirmance of the principle just enunciated. *The Commission has not permitted its Rules to be employed as obstacles to obscure and defeat the public welfare, the justice, and the legal merits of the matters coming before it.*

15. It is manifest that the proper interpretation and application of the Commission's Rules is to apply and interpret them *in each case* in a manner that will accomplish the most service to the public interest, convenience, and necessity and to, *in each case,* avoid an application and interpretation of the rules that will redound to the detriment of the public interest, convenience, and necessity.

16. It is submitted that, based on the premises aforesaid, the public interest, convenience and necessity
509 will be served by the granting of the instant applica-

tion of the Matheson Radio Co., Inc., licensee of Radio-station WHDH.

Respectfully submitted,

MATHESON RADIO CO., INC.,

By: W. THEODORE PIERSON

W. THEODORE PIERSON,

ANDREW G. HALEY,

Its Attorneys.

Address:
Earle Bldg.,
Washington, D. C.

Exhibit A—See Page 50a

553 *Opposition of Matheson Radio Co., Inc. to Petition to Intervene of National Broadcasting Company*

Comes now Matheson Radio Co., Inc., through its attorneys, and opposes the petition of National Broadcasting Company (licensee of Station KOA, Denver, Colorado) to intervene in the above entitled cause.

In support whereof Matheson Radio Co., Inc. (Station WHDH) shows as follows:

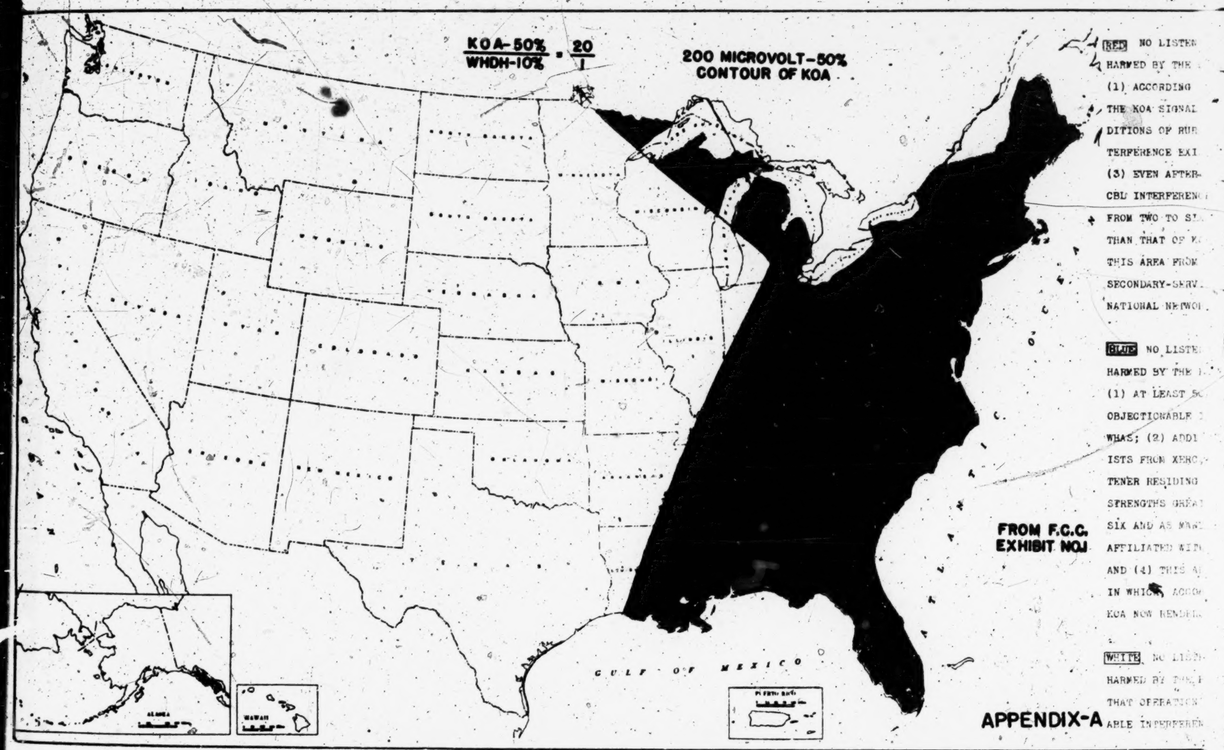
(1) The petition, in spite of all of its camouflaging arguments on the merits and the law of the WHDH case, must stand or fall for what it is—a petition to intervene. The petitioner asserts the legal right or requests the privilege to be heard before a final decision is rendered on the application of WHDH.

(2) The only classes of persons who are accorded the legal right to be heard under Title III of the Communications Act of 1934, are the following:

(a) Applicants whose applications are to be denied.

(b) Licensees whose licenses are to be revoked or modified.

(c) Licensees for whom the issuance of a regulation will change the frequency, authorized power, or time of operation of the stations licensed to them.



FROM F.C.C. EXHIBIT NO.

APPENDIX-A

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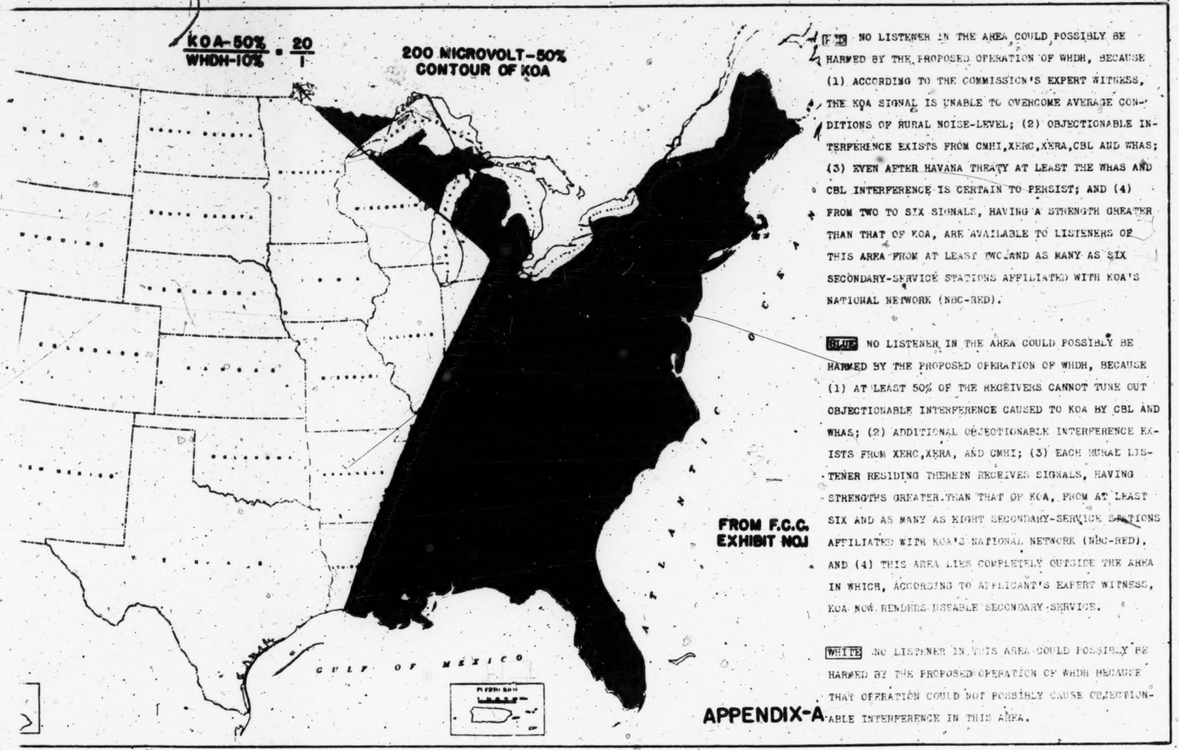

FROM F.C.C. EXHIBIT NO.

APPENDIX-A

RED NO LISTENER IN THE AREA COULD POSSIBLY BE HARMED BY THE PROPOSED OPERATION OF WHDH, BECAUSE (1) ACCORDING TO THE COMMISSION'S EXPERT WITNESS, THE KOA SIGNAL IS UNABLE TO OVERCOME AVERAGE CONDITIONS OF RURAL NOISE-LEVEL; (2) OBJECTIONABLE INTERFERENCE EXISTS FROM CMHI, XERC, XERA, CBL AND WHAS; (3) EVEN AFTER HAVANA TREATY AT LEAST THE WHAS AND CBL INTERFERENCE IS CERTAIN TO PERSIST; AND (4) FROM TWO TO SIX SIGNALS, HAVING A STRENGTH GREATER THAN THAT OF KOA, ARE AVAILABLE TO LISTENERS OF THIS AREA FROM AT LEAST TWO AND AS MANY AS SIX SECONDARY-SERVICE STATIONS AFFILIATED WITH KOA'S NATIONAL NETWORK (NBC-RED).

BLUE NO LISTENER IN THE AREA COULD POSSIBLY BE HARMED BY THE PROPOSED OPERATION OF WHDH, BECAUSE (1) AT LEAST 50% OF THE RECEIVERS CANNOT TUNE OUT OBJECTIONABLE INTERFERENCE CAUSED TO KOA BY CBL AND WHAS; (2) ADDITIONAL OBJECTIONABLE INTERFERENCE EXISTS FROM XERC, XERA, AND CMHI; (3) EACH RURAL LISTENER RESIDING THEREIN RECEIVES SIGNALS, HAVING STRENGTHS GREATER THAN THAT OF KOA, FROM AT LEAST SIX AND AS MANY AS EIGHT SECONDARY-SERVICE STATIONS AFFILIATED WITH KOA'S NATIONAL NETWORK (NBC-RED), AND (4) THIS AREA LIES COMPLETELY OUTSIDE THE AREA IN WHICH, ACCORDING TO APPLICANT'S EXPERT WITNESS, KOA NOW RENDERS USABLE SECONDARY SERVICE.

WHITE NO LISTENER IN THIS AREA COULD POSSIBLY BE HARMED BY THE PROPOSED OPERATION OF WHDH BECAUSE THAT OPERATION COULD NOT POSSIBLY CAUSE OBJECTIONABLE INTERFERENCE IN THIS AREA.

tation KOA has no application pending before the Commission which, so far as this proceeding is concerned, is to be denied. So far as this proceeding is concerned, KOA's license is under no threat of revocation or modification. So far as this proceeding is concerned, no rule or regulation is proposed or in prospect that will change the frequency, the authorized power or the time of operation of KOA. From the foregoing it is clear that KOA has no vestige of legal right to a hearing before a decision on the application of Station WHDH.

(3) To make out its intervention as a matter of privilege, available only at the discretion of the Commission, petitioner is bound by the requirements of Section 1. 102 of the Rules of Practice and Procedure which provides that the petitioner must set forth "the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest * * *"

(a) The petitioner has no definable interest in these proceedings. The allegation of the petitioner that the proposed operation of WHDH would "result in interference to Station KOA in areas where KOA signals are now interference-free" is simply not a fact. The record in this case conclusively shows that the proposed operation of WHDH will not cause interference in any area where KOA now renders interference-free service. The petitioner does not allege that this evidence is erroneous or that the petitioner possesses any evidence to the contrary. Perhaps the petitioner was dreaming of what it might serve if and when the North American Regional Broadcasting Agreement ever becomes effective in whole or in part. This is such a conjectural future prospect that it is wholly fictitious as a present interest.

(b) Assuming, *arguendo*, that KOA has an interest, it has failed completely in its petition to allege one fact to demonstrate that its participation will serve the public in-

terest. It would like to file motions, cross-examine witnesses, present evidence, file findings, file exceptions and request oral argument. Lawyers generally like to
555 do these things. But what about the public interest? How will all of these legalistic exercises benefit the public interest? The petition is completely silent on this fundamental requirement for intervention.

(4) The petition, instead of establishing grounds that would furnish the basis for the privilege of intervention, takes advantage of the petition to express its views on the merits and the law involved in the WHDH case. As a stranger to the proceedings, and as one who has no right or privilege to be anything else, these views of KOA might be appropriate for a law review or trade journal article but are wholly irrelevant and impertinent to the instant question of intervention. It appears clear that the petitioner has misconstrued the time and place for expressing its views.

(5) Prior to the hearing on the instant application the petitioner filed a petition to intervene in the proceeding to which applicant offered no opposition. On September 29, 1939 this petition was denied in the Motion Docket. The denial was unanimously affirmed by the Commission *en banc* on October 10, 1939. The instant petition presents no new facts in support of the right or privilege to intervene. It merely rehashes the same old facts and adds wholly gratuitous expressions of its views on totally irrelevant matters. Those facts were not sufficient at the beginning of the proceeding, *A fortiori*, they are not sufficient now; especially, when petitioner seeks to void the whole proceeding *ab initio*. The petitioner states in effect, that he will ask that the expense and time applicant and the Commission has devoted to this cause become a complete loss, even though petitioner has failed in two attempts to establish any basis of personal or public interest for his participation.

(6) It is suggested that the questions here presented are fundamental and, in view of the past proceedings in

the case, should be passed upon by the Commission *en banc.*

556 WHEREFORE it is respectively submitted that the petition of the National Broadcasting Company to intervene should be denied.

Respectfully,

MATHESON RADIO COMPANY, INC.
By ANDREW G. HALEY,
Earle Building,
Washington, D. C.

By W. THEODORE PIERSON,
Munsey Building,
Washington, D. C.

Its Attorneys.

765 *Order*

Upon consideration of the Petition for Stay filed April 11, 1941 by National Broadcasting Company, Inc. (KOA), Denver, Colorado, requesting the Commission to stay its Order of April 7, 1941 granting the application of Matheson Radio Company, Inc. (WHDH), Boston, Massachusetts, and the opposition filed April 14, 1941 by Matheson Radio Company, Inc. (WHDH), to the Petition for Stay;

It Appearing, That the sole basis for the relief requested in the Petition for Stay is an allegation of "great and irremediable damage" to the private rights of petitioner without any facts to support it and that, therefore, petitioner has failed to state a ground for Stay; and,

It Appearing Further, Upon an independent examination of the facts and circumstances, that public interest, convenience and necessity will be served by the Commission, on its own motion, staying its action of April 7, 1941 pending the filing and determination of a Petition for Rehearin-:

Now Therefore, It Is Ordered, This 22nd day of April, 1941, that the Petition for Stay filed April 11, 1941 by National Broadcasting Company, Inc. (KOA) Be, And It Is Hereby, Denied.

It Is Further Ordered on motion of the Commission that the Order of the Commission April 7, 1941 in the above-entitled matter Be, And It Is Hereby, Suspended, pending the filing by National Broadcasting Company, Inc. (KOA), within the time allowed by the Statute, of a Petition for Rehearing and the determination thereon by the Commission or until further order of the Commission.

FEDERAL COMMUNICATIONS COMMISSION

T. J. SLOWIE,
Secretary.

Signed By Above Mailed by Apr 23 1941 Mail And Files

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806 *Opposition of Matheson Radio Company, Inc. (Station WHDH) to Petitions for Rehearing of National Broadcasting Company (Station KOA) and Earl C. Anthony et al. (The Clear Channel Group): and Opposition of Matheson Radio Company, Inc., to the Berks Broadcasting Company's (Station WEEU) Petition for Reconsideration and Request for Modification of Order.*

Comes now Matheson Radio Company, Inc., licensee of Station WHDH, Boston, Massachusetts, the applicant in the above entitled proceedings, through its attorneys, and opposes:

1. The petition of National Broadcasting Company, Inc., (Station KOA) for rehearing,

807 2. The petition of Earl C. Anthony et al. (The Clear Channel Group) for rehearing, and

3. The petition of Berks Broadcasting Company (Station WEEU) for reconsideration and request for modification of order.

All of the points made in each of the foregoing petitions have heretofore been presented to the Commission by said petitioners, and all of the points made have been fully and completely answered by Matheson Radio Company. The points made by the petitioners were completely argued by each of them before the Commission. Those arguments were completely answered before the Commission in the argument on behalf of Matheson Radio Company. The answers herein are not intended to be exhaustive, in view of the fact that a most comprehensive record covering all of the points is already before the Commission.

Opposition to the Petition of National Broadcasting Company, Inc. (Station KQA) for Rehearing.

I.

National Broadcasting Company (hereinafter called National) admittedly is not a party to this proceeding. Its petitions for intervention were rejected by the unanimous vote of the Commission.

In its petition to intervene dated September 23, 1939*. National did not allege that it would receive any
808 financial or pecuniary damage or injury. That petition was denied by Commissioner Payne on October 2, 1939.**

* On page 5 of its brief, National refers to a petition for rehearing filed by it on February 23, 1939. This statement is undoubtedly inadvertent, as the Commission's records fail to disclose any petition for intervention filed on February 23, 1939. The statement undoubtedly refers to the petition to intervene of September 23, 1939.

** In the National Broadcasting Company brief, the following statement is made: "This petition to intervene was denied by Commissioner Payne on October 2, 1940, and on October 10, 1940, a petition to review his action, filed under Section 1.256 was also denied by the Commission." The dates stated are undoubtedly in error, as the actions indicated were taken in 1939.

Following the denial of the petition to intervene dated September 23, 1939, counsel for National filed a "petition for review under Section 1.256." Here again National failed to state or claim that it would be financially or economically injured because of electrical interference or any other factor by the granting of the application of Matheson Radio Company. The petition was considered by the Commission on October 10, 1940, and by a unanimous vote thereof, was denied.

Again on December 16, 1940, National petitioned to intervene in this proceeding, and again National wholly and completely failed to state that it would be aggrieved or adversely affected because of financial or pecuniary considerations.

Finally, National has filed the instant petition for rehearing. There is absolutely no claim, and not even a left-handed inference, in this petition that National will suffer financial or economic injury by the granting of the application of Matheson Radio Company.

The simple fact remains that during this long proceeding, National has not at any time claimed that it would be adversely affected or aggrieved within the meaning of the statute as interpreted by the Supreme Court of the United States and the United States Court of Appeals for the District of Columbia.

So far as this case is concerned, National has no *locus standi* before the Commission or before the Courts.

809 Section 405 of the Communications Act of 1934, providing for rehearing before the Commission, limits those who may petition for rehearing to "any party or any person aggrieved, or whose interests are adversely affected" by a decision, order or requirement of the Commission. National has not even alleged any legal aggrievement or adverse effect, and accordingly the instant petition should be dismissed with prejudice.

The phrase "any person aggrieved or whose interests are adversely affected" appearing in Section 405 of the Act must have the same legal meaning as "any other per-

son aggrieved or whose interests are adversely affected" appearing in Section 402b(2) of the Act. In interpreting the latter phrase, the Supreme Court stated, in *Federal Communications Commission* v. *Sanders Brothers*, 309 U. S. 470, "It [Congress] may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license." Thus, financial injury is the test, and a mere allegation of interference is insufficient. Cf. *Brown Radio Service and Laboratory* v. *Federal Communications Commission* (decided February 3, 1941, by United States Court of Appeals for District of Columbia.)

In the *Sanders* case the Supreme Court also pointed out, "We hold, therefore, that the respondent had the requisite standing to appeal, and to raise, in the Court below, any relevant question of law in respect of the order of the Commission." Those words clearly show that as National would have no standing in the Court of Appeals under any section of the Act, it could not raise questions involving the proceeding in which it had no right to participate
810 or to appeal from. In other words, if National had a proper standing it could raise any relevant question, but having no standing it can raise no question.

II.

If we assume, *arguendo*, that the petitioner has the right to petition for rehearing, it will be found that the several "errors" alleged by the petitioner are baseless and without merit, and accordingly the petition should be denied. The discretion which the Commission can exercise under Section 405 of the Act is necessarily sound discretion, and we submit the allegations of the petitioner contain no basis for the favorable exercise of sound discretion. Accordingly, if the petition were granted, the Commission would be abusing its discretion.

The petitioner's allegations concerning interference are wholly fictional. It may be briefly pointed out that Station KOA does not render interference-free service to any rural listeners in the eastern part of the United States. It will never do so until the adjacent-channel interference caused by clear-channel stations WHAS, Louisville, Kentucky, and CBL, Toronto, Canada, are removed. Applicant knows of no proposal or prospect for the removal of these latter stations as an interference factor to KOA. Stations CBL and WHAS are each entitled to increase power to 500 KW. insofar as the Havana Treaty is concerned. If we are to assume an increase in power by KOA at some time in the future, we must also assume increases in power by CBL and WHAS. In such an event the interference-free service area of KOA would not be enlarged to cover any more of the area of the eastern part of the United States than it now does. Incidentally, even though National has applied for 500 kilowatts on behalf of another of its stations it did not do so for KOA. The KOA
811 interference-free service to this eastern area is now, and promises ever to be, a wholly fictional thing that exists only in the minds of those who, for one purpose or another, choose to ignore realities. Station WHDH knows of no competent engineer who honestly denies this.

National's specifications of error numbered 2, 3 and 4, relating to the unanimous actions of the Commission in denying its petition to intervene of September 23, 1939, its motion to dismiss WHDH's application of September 29, 1939, and its petition to intervene dated December 15, 1940, are wholly without merit. National did not allege any facts or legal bases for favorable action by the Commission. These matters heretofore have been argued in writing and orally *ad nauseam*.

National's No. 1 specification and No. 1 argument is that the Commission erred in failing to return the WHDH application under Section 1.72 of its rules, because WHDH was applying for full time on a frequency having as its dominant station, KOA. This is an utterly pious argument,

designed by National to make the Commission tread the straight and narrow path of rule observing. Yet, under exactly the same procedure that the WHDH application was set for hearing, this pious petitioner had its own application to increase the power of WJZ to 500,000 watts in violation of Commission's rules, also retained by the Commission and set for hearing (B1-P-1098). It was perfectly all right for this Jeremiah to request in violation of the rules the use of 500,000 watts power in the largest metropolitan district in the United States, and for the Commission to retain that application and set it for hearing, but it is not all right for the Commission, under exactly the same rules and exactly the same procedure, to retain and consider the application of an independent station in Boston.

812 Counsel for National must know that Rule 1.72 did not become effective until January 1, 1939. The application of WHDH, and the application of National just referred to (WJZ—B1-P-1098) were filed under the provisions of Rule 104.1. In both cases the applications were returned to the respective applicants and under the existing procedure, the applications were refiled and made available for the Commission's consideration. In the case of WHDH the application was returned by the Commission on September 21, 1938, and on October 24, 1938, it was resubmitted and accepted for filing. (See Report No. 732, October 27, 1938.)

In specification 5, National contends that the Commission is without power to amend its rules by removing the frequency 850 kilocycles from 3.25(a) to 3.25(b) of its regulations. Congress gave such power to the Commission, and Congress is the only body that can abrogate the power. The Commission has the power to amend its rules without holding any hearing whatsoever. It derives that power from the Act creating the Commission, and it has carried into its own rules a further expression of the power contained in the Act, namely Rule 1.21, which reads, "The rules and regulations of the Commission may be suspended, revoked, modified, amended, or supplemented, in

whole or in part, at any time by the Commission". The action of the Commission in this case, in amending its rules, is not subject to judicial review.

Specification No. 6 touches upon the same point, but in that specification, National conceives of the Commission as being some sort of a marionette that jumps up with a black robe on and is then termed quasi-judicial, and having performed, then disappears to jump up with a toga on to
813 act in a legislative capacity. National apparently is trying to build up a straw man on the basis of the *Arizona Grocery Company* v. *Atchison, etc., Railway Company* case (284 U. S. 370). In doing so, National is only disclosing its own conception that it has property rights in the frequency 850 kilocycles. Because, in the *Arizona Grocery Company* case, the Supreme Court decided that if the Interstate Commerce Commission, having set a maximum reasonable rate in obedience to the command of the statute, it could not, in a suit for damages, hold that the maximum rate thus set up was unreasonable.

The entire point of the case is that private property rights had accrued under the maximum rate set, and to change the maximum rate with retroactive effect would be an *ex post facto* legislative act.

The Commission, in the WQAM decision, has already pointed out that the classifications of stations as Class 1, 2, 3 etc., is merely for administrative convenience, and that such classifications do not apply to any license, and confer no rights upon any licensees.

The Supreme Court of the United States and the United States Court of Appeals for the District of Columbia have ruled without exception that licensees have no property rights in frequency. The point made by National is wholly without merit and is contrary to the settled law.

In line with the foregoing discussion, National in Specification 5 also states that amending the rule has resulted in a modification of its license without a hearing, contrary to Section 312(b) of the Act, but the simple fact is that the Commission has not modified the license of Station KOA.

Likewise, National contends that a change has been made in its license without its consent, contrary to Section 303(f) of the Act. We grow weary showing the ineptitude
814 of these claims. KOA's frequency has not been changed. It still will operate on 850 kilocycles, its authorized power remains the same, and the times of operation remain the same.

In the same tenor, the claim is made that a change in policy results from the action of the Commission, and that the hearing should have been held before an examiner. The action of the Commission is strictly in conformity with its existing policy. The policy of the Commission in duplicating stations on clear channels has found expression in connection with KPO, WLAW, KFEQ, WPTF, KMPC, WOR, KIRO, WBAL, WLB, WCAL, WEW, WJZ, KXA, KGO, KOAM, WGY, WCFL, WIBG, KJR, WBZ, WBZA, KTHS, KYOS, WTIC, KWJJ, KRLD, KNX, WIBC, KFBI, WEAU, KGDM, KWKH, WCAR, WOV, WAPI, WSPR, KVOO, WMAZ, WDGY, KOB, WINS, WJSV, KSTP, WMEX, WLAC, KGA, WHIP, WKBW, KOMA, WPRP, KFBK, WCKY.

National fears we may prejudice priority rights under the Havana Treaty. Again it deals in fictions. What good is the right of protection from foreign stations operating on the same channel, when it is not sufficient to free KOA from interference from adjacent channels in the eastern half of the United States. It is but an empty and useless right. But even the claim that the Havana Treaty protects our so-called Class I-A stations from objectionable interference within the borders of our country is a fallacy. If we adopt the Treaty definition of objectionable interference as between stations operating on the same channel (20 to 1, desired or undesired) and have in mind that the Treaty permits foreign stations operating on our Class I-A frequencies to transmit nighttime signals having a value of 25 uv/m-10 per cent of the time at our border, it is clear that the KOA signal, to be interference-free in the
815 United States, must have a value of 500 uv/m-50 per

cent of the time at all points within the United States. Even if KOA operated with 1,000,000 watts it could not meet this requirement.

As a sort of summation KOA talks of "degrading" the 850 kilocycles frequency as a result of the Commission's order. Does one degrade a frequency by refusing to recognize fictions and to overlook realities? Could anything be more horribly degrading to a frequency than to hold that service it doesn't render should be protected? Applicant first wishes to question the propriety of the term "degradation" and, failing there to persuade, to suggest its adoption as a basic and fundamental policy of the Commission.

National raises an issue concerning 307(b) of the Act. No listeners who receive interference-free satisfactory service from KOA have been deprived thereof by the order of the Commission. All of the listeners living in that area where KOA renders only "poor" and "occasional" service receive seventy-five per cent of the programs broadcast by KOA from many other stations that furnish them with much better electrical service. No other listeners of KOA can possibly be affected. On the other hand, 2,285,000 listeners who do not now receive nighttime service from WHDH, nor do they receive the programs of WHDH from any other station, will receive nighttime service from WHDH as a result of the final order of the Commission.

In Specification No. 7 National charges that as a result of the order there will be a new kind of use of the frequency 850 kilocycles. This contention, of course, is preposterous. The Commission does not contemplate using 830 kilocyles as a video channel for television, or anything of the sort.

Specification No. 8 has already been answered from many viewpoints.

816 The remaining specifications merely express the complaint that National was deprived of a hearing, and that in any event sufficient evidence was not adduced at the hearing which was held. In answer to those propositions, it is perfectly clear that National had no rights to

a hearing, and that the findings of the Commission are supported by ample facts.

Opposition to the Clear Channel Group Petition for Rehearing.

In support of its opposition, applicant states as follows:

I.

Petitioners Have No Standing Under Act.

The petitioners have no standing to file a Petition for Rehearing under the Communications Act of 1934, and the petition should, therefore, be dismissed with prejudice. In support whereof, applicant states as follows:

A. Section 405 of the Communications Act accords the right to petition for rehearing only to parties to the proceedings or to persons aggrieved or whose interests are adversely affected by the decision, order, or requirement in question.

B. Petitioner is not and has never been a party to the instant proceeding. Petitioners with amazing, amusing and alacritous inconsistency both admit and deny this in their petition. Witness the following:

1. In paragraph one, page two, of the petition, petitioner states, "Petitioners have been, and are, parties to this cause * * *" Here they say they *are* parties,

817 2. In paragraph seven, page five, Petitioners state, "On December 5, 1939, the Commission, acting by order of Commissioner Case, ordered that petitioners' petition to intervene * * * be dismissed without prejudice." Here they say they were *refused* privilege of being parties.

3. In paragraph nine, page seven, Petitioners state, "petitioners thereupon, on December 16, 1940, filed their second petition to intervene * * * This petition

was referred to the full [sic] Commission and was denied January 7, 1941 * * *." So far as the public order and releases of the Commission show, this decision was unanimous. Here, again the Commission *refused* to make them parties.

4. In the "Specifications of Error", paragraph three, page twelve, Petitioners state, "Petitioners * * * were denied an opportunity to be heard, the right to present evidence and * * * the right to participate in the proceedings * * *." Here they assign, as error, the Commission's failure to make them parties.

While the petitioners can not seem to determine for themselves such a simple and obvious fact that they were not parties, applicant can state decisively that they were neither parties to the instant proceeding nor did they have the legal right to be parties. Specifically incorporated as a part hereof is the detailed argument showing the petitioners complete lack of legal right to be parties, contained in Part III-A of applicant's Brief filed on February 17, 1941, pages 2 to 11 inclusive. An indulgent Commission permitted the petitioners to become "Friends of the Court", but
818 that surely did not give them license to presume on that "Friendship" by arrogating to themselves privileges or rights which the Commission has conclusively and unanimously denied them.

C. Petitioners are not persons aggrieved or persons whose interests are adversely affected by the decision on which rehearing is sought. To be so classified, under the Act, they must show that they will suffer financial or economic injury, ensuing from electrical interference or otherwise, as a result of the decision of the Commission. Significantly, their petition fails to do any more than allege the conclusion that they will be aggrieved or adversely affected. No allegations, supporting this conclusion, are made. This omission is mute but conclusive evidence of the indubitable fact that even these privileged princes of broad-

casting, who have conjured, fancied, and perpetrated the "cleared-channel myth", cannot concoct or dream-up an even infinitesimal depletion of their overflowing coffers, as a consequence of the instant decision.

D. Since the petitioners are neither parties to the proceeding nor persons aggrieved or whose interests are adversely affected, their petition should be dismissed with prejudice.

II.

Insufficiency of Specifications of Error.

Assuming, *arguendo*, that petitioners have the right to petition for rehearing, the applicant submits that the petitioners' "Specifications of Error" are completely insufficient as a showing of error in the instant proceeding. In support whereof, applicant states as follows:

819 A. As their first specification, petitioners state:

> "1. The order is premised upon determination of an issue which had theretofore been expresaly excluded from the proceeding both by action of the Commission and by express disclaimers of the applicant, and, therefore, constitutes a denial of due process under the Fifth Amendment of the Constitution and a violation of the procedural requirements (including the right of persons who may be adversely affected to an opportunity to be heard and to present evidence) of the Communications Act of 1934."

In reply, applicant states that, since all the parties who have a legal or constitutional right to be heard in the instant case have agreed or acquiesced to the inclusion of the issues covered by the majority decision, there has been no denial of a fair hearing or due process of law in the instant proceeding. Applicant's argument, in support of this contention, contained in Part III-A of its Brief, filed on February 17, 1941, is specifically incorporated as a part hereof.

B. As their second specification, petitioners state:

"2. The order, insofar as it attempts to effect an amendment of Section 3.25, constitutes an improper exercise of a legislative function (with retroactive effect) in a judicial proceeding which is either (a) beyond the Commission's power, both under the Constitution and under the Communications Act of 1934, or (b) if the Commission has such power, does not represent a sound policy with respect to the procedure to be used in formulating and adopting amendments to its regulations, and, in any event, was contrary to the Commission's regulations, particularly Section 1.192, establishing a procedure consisting of informal hearings (either on petition or on the Commission's own motion) as the proper procedure for securing amendments to its rules and regulations."

In reply, applicant states that:

1. The contention that there is legal error in the amendment of a Rule, that affects no legal rights of the past, present, or future, is so ludicrous that one engages in superfluities to argue the matter. Furthermore, that it has "retroactive effect", challenges the most tenuous imaginings.

2. In spite of the fact that the Commission is neither a legislative nor a judicial body the petitioners speak of "legislative functions" and "judicial proceedings" as though they were legal terms, clearly defined, delimited and made applicable to the instant case by authoritative and controlling rules of law. There are no such rules of law in existence, either in the form of statutory enactments or judicial decisions. In Part III-B of the Applicant's Brief, filed on February 17, 1941, which is specifically incorporated as a part hereof, applicant presented detailed argument, conclusively showing that the Commission has the power and the

support of sound policy to amend Rule 3.25 as proposed.

C. As their third specification, the petitioners state:

"3. Petitioners, having an interest in the proceedings in that they would be aggrieved and their interests would be adversely affected by the amendment of Section 3.25, were denied an opportunity to be heard, the right to present evidence, and (except as herein noted) the right to participate in the proceedings, through
821 the Commission's actions denying petitioners' petitions to intervene, filed September 29-30, 1939, and December 16, 1940."

This contention was treated in Part I of this pleading and need not be repeated here.

D. As their fourth specification, petitioners state:

"4. The order purports to grant an application which, under the Commission's regulations (particularly Section 1.72), should have been returned to the applicant as a defective application, and could not be considered or granted, the Commission having erroneously denied petitioners' motion to dismiss, filed September 30, 1939."

In reply, applicant states that:

1. Section 1.72 of the Rules of Practice and Procedure, to which petitioners refer, did not become effective until January 1, 1939. The instant application was filed in July, 1938, at which time the predecessor Rule, denominated Rule 104.1, provided as follows:

104.1. If an applicant, by specific request of the Commission, is required to file any documents or information not included in the prescribed application forms, a failure to comply therewith shall constitute a defect in the application, and the application will not

be considered by the Commission. Any application which is not filed in accordance with the Commission's regulations with respect to *the form used, manner of execution* and *completeness of answer to questions* therein required will not be considered by the Commission. Each such application shall be returned to the applicant by the secretary of the Commission. Each such application shall be returned to the applicant by the secretary of the Commission, together with a brief statement of the respect in which it is defective. (Italics supplied)

822 The instant application was filed on the proper form (Form 301); it was executed in the manner provided by the Rules and Regulations of the Commission; and all the questions were completely answered by the applicant. There was therefore, no violation of the applicable Rules in the filing of the instant application.

2. It was the practice of the Commission from its inception in August, 1934 to January 1, 1939, whenever an application was received that requested facilities not contemplated by the Rules of Allocation, to return such application to the applicant, inform him of the fact and advise him that, if he should desire a hearing on the application, the application should be resubmitted. The petitioners are well aware of this practice and have often taken advantage thereof. All but four of them filed, under Rule 104.1, applications for 500 kw operation. Such facilities were not contemplated in the Rules of Allocation. They were returned to them, they resubmitted them, and the applications were designated for hearing. They are still pending on the Commission's Docket. Can they thus take advantage of a Rule or Practice of the Commission when it serves their purpose or interests and, then, deny its existence or propriety when others do so to the alleged disadvantage of the Petitioners? The Rule and practice, above referred to, was not a special writ issued to petitioners as

princes of special privilege. It applied to all applicants, even the most humble.

3. The Commission, following its usual practice, returned the instant application on September 24, 1938,
823 and advised applicant that if it desired a hearing, the application should be resubmitted together with a request for hearing. The applicant did so on October 25, 1938. The Commission, in due course, designated the application for hearing on January 3, 1939.

4. It is clear that the instant application was not filed and prosecuted in violation of any Rule or Regulation of the Commission applicable thereto. The applicant complied with all the requirements of the Commission that were prerequisite to perfecting its statutory right to a hearing. To give retroactive effect to a later Rule and deprive applicant of this "fully blossomed" legal right, would be in the nature of *ex post facto* legislation. Surely, the petitioners can not countenance or suggest such an invasion of constitutional rights—or can they when it is to their advantage?

E. As their fifth specification, petitioners state:

"5. Under Section 409(a) of the Communications Act of 1934, the Commission has no power to effect a change in policy (including an amendment to its regulations or a new kind of use of frequencies, such as is involved herein) in a proceeding wherein the hearing was held and a record made before an Examiner."

In reply, applicant states that:

1. The order of the Commission amending Rule 3.25 and granting the application of WHDH does not constitute a change of policy. In the original Rules of Allocation forty cleared-channels were established. In

the thirteen years that have intervened since the
824 promulgation of those first Rules of Allocation, the Commission has reduced the number of cleared-channels to twenty-five and allowed duplication at night on fifteen of them. The Commission's policy through the years has been to duplicate cleared-channels at night if the public interest, convenience, and necessity would be served thereby. The instant order amending Rule 3.25 and the order granting the instant application are pursuant to and in conformity with this well-established policy of the Commission.

2. Even if it is assumed, for the purpose of argument, that the instant order constitutes a change of policy, within the meaning of Section 409(a) of the Communications Act, there has been no legal error in the instant proceedings. Section 409(a) cannot be interpreted to provide that where an examiner of the Commission has taken evidence on an application, which evidence might also be relevant to the consideration of Commission policy, the Commission is thereby precluded from changing the policy without a legislative hearing or from adding the facts thus obtained by the examiner to the Commission's fund of expert knowledge. It cannot be concluded that Congress intended any such absurd or unwise result.

3. Even if we assume, for the purpose of argument, that the examiner in this case did not have the power, under Section 409(a), to hold a hearing, administer the oaths, or take the evidence, all because the Commission later decided to amend Rule 3.25, the only effect would be to render the hearing on the application invalid—that is, there would have been no hearing on the application in the sense of the statute. Since the Com-
825 mission does not have to hold a hearing before it grants an application or hold a hearing before it amends a Rule, the invalidation of the hearing on the instant application could not legally bar the Commis-

sion from granting the application or amending the rule.

F. As their sixth specification, petitioners state:

"6. The amendment of Section 3.25 effected by the order is contrary to public interest, convenience, or necessity, in that it will result in (a) a degradation of broadcast service through interference, both on 850 kc and, eventually, on other frequencies, and will prevent or obstruct future improvement of such service, although such service is now grossly inadequate and improvement is badly needed; (b) a surrender of rights of the United States and of the listening public therein to the protection against interference from stations in other countries under the North American Regional Broadcasting Agreement; (c) unjust discrimination in favor of persons dwelling in cities already having stations and adequate broadcasting services and against persons in rural and sparsely settled areas and in small cities and towns having no stations of their own and having grossly inadequate broadcasting services; and (d) a violation of the requirements of Section 307(b) of the Communications Act of 1934 that the Commission, in its actions on applications, shall provide a fair, efficient and equitable distribution of radio service."

In reply, applicant states that:

1. Station KOA does not render interference-free service to any rural listeners in the eastern part of the United States. It would not even do so were it to increase its power to 500 kw or more so long as stations
826 WHAS, Louisville, Kentucky and CBL, Toronto, Canada, remain on the adjacent channels with equivalent operating power. The KOA interference-free service to this eastern area, which is the only area in which WHDH could possibly be a source of objectionable interference, is a wholly fictional thing and merely a part

of the cleared-channel myth that exists only in the minds of those who choose to ignore realities.

2. No useful rights will be surrendered by the United States under the North American Regional Broadcast Agreement as a result of the instant decision of the Commission. On the contrary, the only way the maximum use of the channel can be made, in accordance with our rights under that Agreement, is to make use of that frequency in those parts of the United States in which it is not now being used to render interference-free service and in which it has no future prospect of ever being so employed. Probably the petitioners intended and hoped that the North American Regional Broadcast Agreement would provide an unconquerable fortress against future invasion of their mythical domain of nationwide service. It is true, the Agreement, as finally effectuated, protected service that most of the cleared-channels do not render from foreign interference, all at the expense of the interference-free service that could be rendered by stations on local and regional channels. There is no room for WHDH and other stations similarly situated to obtain needed additional facilities except by using the frequencies assigned to and not usefully employed by KOA and other clear-channel stations. It appears that petitioners may
827 have been *too* clever and may be caught in the inevitable consequences of their own cleverness. An allegedly true story, carried to the extremes of unrealities, generally explodes in the face of the weaver of the tale.

3. There can result in the instant decision no unjust discrimination in favor of persons dwelling in cities and against persons in rural and sparsely settled areas. No rural listeners, who now obtain useful or needed service from KOA, will be deprived thereof by the effectuation of the instant decision of the Commission.

6. As their seventh specification, petitioners state:

"7. The order is arbitrary and capricious, and the findings of fact upon which it is based are not supported by substantial evidence, insofar as they have to do with the said amendment of Rule 3.25 and the granting of the application for unlimited hours of operation."

In reply petitioner states that:

1. The order of the Commission is not arbitrary and capricious because it is based upon the sound principles of public interest, convenience and necessity.

2. There is substantial evidence in the record to support the granting of the instant application.

3. The Commission's fund of expert knowledge bearing upon the wisdom of the amending Rule 3.25 is substantial and more than adequate to justify the amendment made by the Commission.

. . . . . .

832. *Request for Final Action Without Further Delay.*

This case has been pending before the Commission for almost three years. National Broadcasting Company and the Clear Channel Group have impeded its course by filing numerous pleadings and by availing themselves of every dilatory device. The points they have made have been argued and reargued under many guises. The major result of the long delay is that the people of the Boston area are being deprived of the public service which the Commission has found should be rendered by Station WHDH in the public interest, convenience and necessity. It is respectfully requested that these petitions be acted upon without delay and that no further stay be made of the Commission's final order.

WHEREFORE, Matheson Radio Company prays that (1) the Commission dismiss the petitions for rehearing of National Broadcasting Company, Inc., and Earle C. Anthony et al. (the Clear Channel Group) with prejudice, or (2) the Commission deny said petitions; and, upon the basis of the premises herein considered, the applicant respectfully requests that the Commission deny the petition of Berks Broadcasting Company for reconsideration and modification of order.

Respectfully submitted,

MATHESON RADIO COMPANY, INC.,

By: ANDREW G. HALEY,
Earle Building,
Washington, D. C.

W. THEODORE PIERSON,
Munsey Building,
Washington, D. C.

859 *Opposition to Petition for Stay During Appeal*

Comes Now the Matheson Radio Company, Inc., licensee of Radio Station WHDH, Boston, Massachusetts, and applicant in the above-entitled proceeding and files this opposition to the petition of the National Broadcasting Company, Inc. for an order staying the effectuation of the Commission's final order issued in the above-entitled proceeding on April 7, 1941.

The applicant's opposition to the aforesaid petition is based upon the following two propositions: (1) The Petition for Stay should be dismissed with prejudice, because the petitioner has no standing under the Communications Act of 1934, as amended, to take an appeal to the Court and, therefore, has no standing to file a Petition for Stay. (2) Assuming for the purpose of argument, that the petitioner has *locus standi* to appeal to the Court of Appeals, the Petition for Stay should be denied.

In support whereof, the applicant shows as follows:

I

A person having no standing to take an appeal to the Court for permanent or final relief has no standing to file a Petition for a stay order for temporary or interim relief. The petitioner does not have standing to take an appeal under the Communications Act of 1934 for the following reasons:

(1) Section 402 provides that appeals may be taken to the United States Court of Appeals for the District
860 of Columbia by (a) an applicant whose application has been denied and (b) by a person aggrieved or adversely affected by the final decision of the Commission.

(2) The petitioner is not an applicant whose application has been denied.

(3) The petitioner is not a person aggrieved or whose interest has been adversely affected by the final order issued by the Commission, for the following reasons:

(a) It is submitted that the aggrievement and the adverse affect contemplated by Section 402 (b) (2) of the Act must be interpreted as requiring a showing of substantial injury, which in turn can only manifest itself in the form of damage to the pecuniary or private business interests of the appellant. (*F. C. C.* v. *Sanders Brothers*, 309 U. S. 470; *Ground Radio Service* v. *F. C. C.*, decided February 3, 1941 by United States Court of Appeals for the District of Columbia.)

(b) In the course of this proceeding, the petitioner has filed, among other things, the following documents: two petitions to intervene, two petitions for stay, and one petition for rehearing. Each of the foregoing petitions were denied by the Commission. In none of those pleadings has the petitioner even alleged, much less shown, that it would suffer any damage to its pecuniary or private-business interests as a result of the final order of the Commission issued in the instant case. The instant petition against
861 which this opposition is addressed fails utterly in that important respect.

(c) The failure of the petitioner to show its standing to appeal under the Communications Act of 1934 in its petition for stay order is fatal and the petition should be dismissed with prejudice.

II.

Assuming, for the purpose of argument, that the petitioner does have *locus standi* to take an appeal to the United States Court of Appeals for the District of Columbia, the petition should be denied on its merits. A stay order should only issue in cases where the petitioner therefor has conclusively shown, first, that the public interest is not injured thereby, and second, that the injury to the private interests of the petitioner resulting from failure to stay the order will greatly exceed the injury of the private interests of others that will result from the issuance of the stay order. The instant petition fails utterly to furnish any such foundation for the relief it prays. That failure is fatal *per se*. Moreover, a further examination of the various interests involved in the instant case conclusively shows that there can be no basis in this proceeding for the issuance of the stay order.

(1) The Commission in its proposed findings, in its final decision and in its decision on the petition for rehearing, filed by the instant petitioner, determined that the public interest, convenience, and necessity would be served by the granting of the instant application and the amendment of Rule 3.25. In its petition for rehearing, which the petitioner incorporates as a part of its petition for stay, the specification of error did not include any allegation that the public interest would not be served by the granting of the instant application or the amendment of the Rule. The said specifications were devoted entirely to alleged
862 procedural errors by the Commission in arriving at its decision. The petitioner, then, has never controverted the final decision of the Commission that the public interest, convenience and necessity would be served by the

granting of the application and the amendment of Rule 3.25. To delay for a substantial period of time, as the instant petition anticipates, service which the Commission found to be in the public interest, would be substantial injury to the interest of the public and no private interests of any person or persons are sufficient, in law, to occasion that injury.

(2) Even assuming, for the purpose of argument, that the factors of public interest in this case are inconsequential or in favor of the petitioner, there are no facts upon which the petitioner could base an allegation of substantial injury to its pecuniary or private business interests. The petitioner's failure to allege such injury is eloquent evidence of the absence thereof. It would be absurd to contend that the rates or the revenue of KOA would be adversely affected by interference in its "poor" and "occasional" secondary service area. It would be fantastic in the extreme for the petitioner to maintain that even an infinitesimal part of the rate paid by any advertiser for KOA has been for communication with listeners in these very remote "poor" and "occasional" secondary service areas. Particularly is this true when it is realized that petitioner's network advertisers buy, simultaneously with KOA, time from two to nine other Class I stations, which give these remote listeners good and satisfactory secondary service or primary service. Applicant is informed and believes that an examination of the "before and after"
863 rates or revenues of stations that in the past have been reduced from so-called Class I-A status to so-called Class I-B status will show that such changes have not caused them to reduce rates or lose revenue. It is clear that, even if one tries to make out the case which the petitioner so miserably failed to make for itself, it is impossible to find any factual or reasonable basis for expected injury to the pecuniary or private business interests of the petitioner.

(3) On the other hand, the applicant is informed and believes that the loss of revenue to the applicant by delaying

its nighttime operation will amount to between $5,000.00 and $7,000.00 per month. This injury to the private interests of the applicant that would result from the delay sought by the petitioner is substantial and should not be inflicted upon the applicant without cause or justification. That cause or justification, as heretofore shown, does not exist either in the form of injury to the public interest or injury to private interests of the petitioner.

(4) To summarize, the issuance of the stay order, requested by the petitioner, would result in substantial injury to the public interest and to the private interests of the applicant and would not serve to avoid injury to the private interests of the petitioner, because the possibility of such latter injury is non-existent.

III

While the point was not specifically made by the petitioner, the applicant does wish to discuss the effect of the final decision of the Commission upon this Government's rights under the North American Regional Broadcast Agreement, together with the questions as to whether
864 the issuance of a stay would serve in any manner to protect and preserve any substantial rights of this Government.

A. Station KOA was reported by this Government to the signatories of the Havana Treaty as a Class I-A station. As such it is entitled to the protection accorded Class I-A stations under that agreement, which requires, *inter alia*, that all stations operating in other countries at night shall be at least 650 miles removed from the nearest border of the United States. While applicant concedes that it will be necessary for the United States Government at the appropriate time, to notify the signatories of the North American Regional Broadcast Agreement that Station WHDH has changed its operation from limited to unlimited time, it does not concede that the Treaty requires the United States Government to change the classification of Station

KOA, under the aforesaid agreement, for the following reasons:

(1) Part II, Section C. (1) of the North American Regional Broadcast Agreement defines a Class I-A station as follows:

"A Class I station which operates with power of 50 kw or more and which has its primary service area, within the limits of the country in which the station is located, free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area, within the same limits, free from objectionable interference from stations on the same channel, in accordance with the engineering standards hereinafter set forth."

(2) Part II, Section A. (6) of the Treaty defines objectionable interference as follows:

"Objectionable interference is the degree of interference produced when, at a specified boundary or field intensity contour with respect to the desired station, the field intensity of an undesired station (or the root-mean-square value of field intensities of two or more stations on the same frequency) exceeds for ten percent or more of the time the values hereinafter set forth in this agreement."

(3) Part II, Section D. (2) of the above-mentioned Treaty provides, *inter alia*, as follows:

"The boundaries or contours at and within which the several classes of stations shall be protected from objectionable interference are as set forth in Appendix II. No station, however, need be protected from objectionable interference at any point outside the boundaries of the country in which such station is located."

(4) Part II, Section D, (3) of the aforesaid Treaty provides as follows:

"Objectionable interference shall be deemed to exist to a station when, at the boundary or field intensity contour specified in Appendix II with respect to the class to which the station belongs, the field intensity of an interfering

station (or the root-mean-square value of the field intensities of two or more interfering stations) operating on the same channel exceeds for ten percent or more of the time the value of the permissible interfering signal set forth opposite such class in Appendix II."

(5) Appendix II, Table I, with reference to Class I-A stations, provides that they shall be protected from interference *day* and *night*, within the boundary of the
866 country in which the station is located, from an interfering signal having a value in excess of *5 microvolts during the daytime and 25 microvolts during the nighttime.*

(6) It is submitted that the foregoing provisions of the Treaty cannot reasonably be interpreted to refer to interference to Class I-A stations that results from stations operating within the boundaries of the country in which the Class I-A station is located. If they are so construed, Station KOA has never qualified as a Class I-A station and should not have been so reported, because the daytime and limited time operations of Stations WRUF, WHDH, KFUO, and WEEU radiate signals during daytime, within the boundaries of the United States, exceeding the value of 5 uv/m. If the Treaty is interpreted as preventing domestic assignments that exceed the interference values set out in Appendix II, Table I, then no daytime or limited time operations should be permitted on KOA's channel. There is no basis in the Treaty to distinguish between interfering signals caused by domestic stations during nighttime and interfering signals caused by domestic stations during the daytime. The Treaty treats both instances in the same manner, as a reference to Appendix II, Table I conclusively shows. It is submitted that the only reasonable interpretation of the Treaty is that it provides against interference from foreign stations only and does not circumscribe or circumvent the discretion of the United States Government, through the Federal Communications Commission, in making allocations to frequencies within its

own boundaries in the manner that it determines the public interest, convenience and necessity to demand.

867 (7) In the event of either interpretation, however, we must reach this dilemma with respect to the instant situation:

(a) If the Treaty prevents assignment of domestic stations to Class I-A frequencies that contravene the provisions of Appendix II, Table I, then, the classification of Station KOA must be changed whether or not the order in the instant case ever becomes final, or

(b) If the Treaty is interpreted as not preventing the domestic assignments to domestic Class I-A frequencies that will cause interfering signals in excess of that provided in Appendix II, Table I, then, the increase in hours of operation to Station WHDH furnishes no basis for a change in the present notification on KOA.

(8) It must be concluded, therefore, that the instant decision does not, *per se*, require a notification by this Government to the other Treaty signatories that the classification of Station KOA has been changed from Class I-A to Class I-B. By the same token, the instant decision cannot be regarded as proximately or remotely causing any real or imaginary injury to the rights of this Government, under the North American Regional Broadcast Agreement. It is submitted that the only notification required by the Treaty is that Station WHDH is operating unlimited time on the frequency 850 kc with 5 kw power. This notification will not give to the other Treaty signatories any greater or further rights than they already have under the notification already given by this Government with respect to this frequency.

(9) It is interesting to note that the Dominion of Canada, one of the signatories to the North American Broadcast Agreement, has obviously interpreted the

868 agreement as not preventing or circumscribing the discretion of that Government in making domestic assignments. In their official notification, which was pub-

lished by the Federal Communications Commission, the Canadian Government assigned to the frequency 1010 kc, Station CFCN, at Calgary, Alberta, with the power of only *10 kw* and with the classification of *I-A*. To the same frequency it assigned CBY to operate with 1 kw power, *unlimited time*. It is obvious from this assignment that the Canadian Government does not interpret the Treaty as preventing it from duplicating at night the stations on the Clear Channel frequencies for which I-A classifications have been given. It is equally obvious that they do not interpret the Treaty as requiring the Canadian Government to require Class I-A stations to operate with 50 kw or more power.

B. Applicant requests that the Commission take notice of the present war emergency and its effect upon the availability of the materials for the construction of stations. The present market for certain materials and instruments needed in the construction proposed by the applicant is becoming more and more contracted as a result of National Defense demands. It is only logical to believe that in the very near future the market is going to contract considerably more. To delay the applicant in the construction of this station may, as a result of the fact that construction materials and instruments are becoming increasingly unavailable, delay the final construction of this station until sometime after the present war emergency ceases to exist. Such protracted and prolonged delay will greatly injure the public interest and the demands of our National Defense for adequate communication facilities. For that reason, if for no other, the operation which the Commission in its decision on this application has found to be in the public interest, should be consummated at the earliest pos-
869 sible date. This is especially true when the case made by the petitioner is, on its face, so completely lacking in merit.

On the foregoing premises, it is requested that the Commission dismiss the Petition for Stay, or in the alternative, deny the Petition for Stay.

Respectfully submitted,

MATHESON RADIO COMPANY, INC.,

By W. THEODORE PIERSON,

ANDREW G. HALEY.

IN

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 7933

NATIONAL BROADCASTING COMPANY, INC.
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION
Appellee

NOTICE OF INTENTION TO INTERVENE.

Comes now Berks Broadcasting Company, a Pennsylvania corporation, by its attorney, George O. Sutton, and pursuant to Section 402 (d) of the Communications Act of 1934, states that it is an interested party and is entitled to participate in the proceedings on the above-styled appeal and hereby gives notice of its intention to intervene therein for the reasons hereinafter given.

BERKS BROADCASTING COMPANY,

By: GEO. O. SUTTON,
1038 National Press Building,
Washington, D. C.

June 27, 1941.

VERIFIED STATEMENT OF INTERVENER'S INTEREST.

District of Columbia, City of Washington, ss:

George O. Sutton, being first duly sworn, states that he is attorney for Berks Broadcasting Company, licensee of Radio Station WEEU, Reading, Pennsylvania, and that notice of intention to intervene in the above-styled appeal has been duly filed, and that intervener's interest is as follows:

1. Matheson Radio Company, Inc. (WHDH) by a decision of the Federal Communications Commission rendered March 26, 1941, effective April 7, 1941, was granted a construction permit to operate unlimited time on the frequency of 850 kilocycles with power of 5 kilowatts at Boston, Massachusetts. Intervener participated in the hearing and oral argument before the Federal Communications Commission in this proceeding. In its decision on said proceeding the Federal Communications Commission in granting the application of Matheson Radio Company, Inc. (WHDH) further ordered that Rule 3.25 (a) be amended so as to permit duplicate nighttime operation on the frequency of 850 kilocycles, nighttime operation on said frequency having been theretofore limited to Radio Station KOA, Denver, Colorado. In its notice of appeal and reasons therefor, appellant requests that said decision and order of the Federal Communications Commission be reversed. Intervener's Radio Station WEEU operates on the aforementioned frequency of 850 kilocycles daytime only and has pending an application to operate unlimited time on said frequency. A reversal of the aforementioned decision of the Federal Communications Commission, as requested by appellant, would result in Rule 3.25 (a) being restored to its original status, thus preventing duplicate nighttime operation on the frequency of 850 kilocycles and would thus prevent the grant of intervener's aforementioned application which is now pending before the Federal Communications Commission.

GEORGE O. SUTTON.

Subscribed and sworn to before me, a Notary Public, in and for the District of Columbia, this 27th day of June, 1941.

HAZEL RAY SMITH,
Notary Public.

My Commission expires February 14, 1943.

ACKNOWLEDGMENT OF SERVICE.

Receipt of a true copy of the foregoing "Notice of Intention to Intervene" is acknowledged this 27th day of June, 1941.

NATIONAL BROADCASTING COMPANY, INC.

By: P. J. HENNESSEY, JR.

FEDERAL COMMUNICATIONS COMMISSION,

By: TELFORD TAYLOR.

By MMC

181 In United States Court of Appeals for the District of Columbia

NATIONAL BROADCASTING COMPANY, INC., APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

and

MATHESON RADIO COMPANY, INC., BERKS BROADCASTING CO., INTERVENORS

Minute entry of argument and submission

Jan. 6, 1942

The argument in the above entitled cause was commenced by Mr. Duke M. Patrick, attorney for appellant, continued by Mr. Telford Taylor, attorney for appellee, and concluded by Mr. Duke M. Patrick, attorney for appellant. Appellee allowed to file memorandum.

182 In United States Court of Appeals for the District of Columbia

Before Honorable D. Lawrence Groner, Chief Justice, and Honorable Justin Miller, Fred M. Vinson, Henry W. Edgerton, and Wiley Rutledge, Associate Justices.

NATIONAL BROADCASTING COMPANY, APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

and

MATHESON RADIO COMPANY, INC., BERKS BROADCASTING CO., INTERVENORS

Minute entry of reargument and submission

June 13, 1942

The Court announced that Mr. Justice Stephens was ill and would be unable to hear the oral argument, but that, if agreeable to counsel for the respective parties, and they so stipulated in writing, the case would be treated as submitted to Mr. Justice Stephens on the record and briefs for consideration and decision with the Judges hearing the oral argument. Thereupon, counsel for each of the parties orally signified their agreement to the submission proposed, and the Court directed that a written stipulation to that effect be filed by the parties. A written stipulation thereafter was filed with the Clerk.

By leave of Court, Mr. W. Theodore Pierson, for the Intervenor Matheson Radio Company, Inc., submitted a motion for leave to file supplemental affidavits, and there being no objection thereto by the other parties, the same was granted.

Reargument in the above entitled cause was commenced by Mr. Duke M. Patrick, attorney for appellant, continued by Messrs. Telford Taylor for appellee, and W. Theodore Pierson, attorney for the Intervenor Matheson Radio Company, Inc., and concluded by Mr. Duke M. Patrick, attorney for appellant. Upon inquiry of Mr. Justice Edgerton if a copy of the license was in the record, Mr. Telford Taylor stated it was not but that he would furnish copies. Thereupon, the Chief Justice announced that the Court would consider the case submitted to the Court of six Judges.

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7933

NATIONAL BROADCASTING COMPANY, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

and

MATHESON RADIO COMPANY, INC., AND BERKS BROADCASTING COMPANY, INTERVENORS.

Appeal from the Federal Communications Commission.

On Reargument

Decided September 12, 1942.

Mr. D. M. Patrick, with whom *Mr. Philip J. Hennessey, Jr.*, was on the brief, for appellant.

Mr. Telford Taylor, General Counsel, Federal Communications Commission, with whom *Mr. Thomas E. Harris*, Assistant General Counsel, and *Messrs. Harry M. Plotkin* and *Daniel W. Meyer*, Counsel, were on the brief, for the Federal Communications Commission. *Messrs. Charles R. Denny, Jr.*, and *Benedict P. Cottone* also entered appearances for the Federal Communications Commission.

Mr. W. Theodore Pierson, with whom *Mr. Andrew G. Haley* was on the brief, for Matheson Radio Company, Inc., Intervenor.

Messrs. Arthur H. Schroeder and *Geo. O. Sutton* filed a brief on behalf of Berks Broadcasting Company, Intervenor.

Before GRONER, Chief Justice, and STEPHENS, MILLER, VINSON, EDGERTON, and RUTLEDGE, Associate Justices.

Opinion

RUTLEDGE, J. The appeal is from an order of the Commission entered April 7, 1941. The applicant (Matheson Radio Company, Inc.) operates Station WHDH at Boston, Massachusetts, and is intervenor here. Appellant operates Station KOA at Denver, Colorado, upon the same frequency, 830 kc, now 850 kc under the North American Regional Broadcasting Agreement. The order authorized increases in power and time for WHDH. Appellant claims it is aggrieved and its interests are adversely affected by the order. Hence it asserts both a right of appeal and one to hearing by the Commission, which denies both. The principal questions are therefore whether, on the showing made, (1) appellant has standing to appeal; (2) the Commission acted arbitrarily or erroneously in refusing to permit it to intervene as a party in the administrative proceedings.

KOA is a Class I station, operating since 1928 on a clear channel with 50 kw power.[1] By virtue of this classification it was the only

[1] Under Sections 3.22 and 3.25 of the Commission's Rules and Regulations, the following provisions concerning clear channel stations are made:

"§ 3.22 *Classes and power of standard broadcast stations.*—(a) *Class I station.* A Class I station is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable

station operating on its frequency at night prior to the order now in question. From 1930 WHDH had been a 1 kw station operating daytime only until sunset Denver time. The order modified its license to permit operation for unlimited time and with 5 kw power. No formal or literal modification was made in KOA's license, but modifying the license of WHDH created electrical interference after sunset in KOA's secondary service. Roughly the region affected is that lying 700 miles or more east of Denver. To accomplish this change, the Commission had to transfer the frequency 850, on which both stations operate, from subdivision (a) to subdivision (b) of Section 3.25 of its rules.[2] Accordingly the order provided for this transfer.

The substantive injury of which appellant complains consisted therefore in creating new and additional electrical interference, affecting its secondary service area; degrading the status of Station KOA from a clear channel station by reclassifying it; and, in effect though not in terms, modifying its license in these respects. As appears below, appellant also asserts these changes not only affected its interests substantially and adversely, but had like effect upon the public interest, in depriving listeners within the secondary service area of its service and also in jeopardizing the status of this frequency under the North American Regional Broadcasting Agreement.[3]

The substantive injuries however, both to appellant and to the public, are set forth primarily not to secure substantive redress in this appeal, but (1) to establish appellant's standing to appeal; and (2) to show that appellant had a right to intervene in the Commission's pro-

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interference from other stations on the same and adjacent channels, and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in accordance with the channel designation in § 3.25 or in accordance with the 'Engineering Standards of Allocation' at page 2756. The operating power shall be not less than 10 kw nor more than 50 kw (see also § 3.25 (d) for further power limitation)."

"§ 3.25 *Clear channels; class I and II.* The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations as given:

"(a) To each of the channels below there will be assigned one Class I station and there may be assigned one or more Class II stations operating limited time or daytime only: 640, 650, 660, 670, 700, 720, 740, 750, 760, 770, 800, 810, 820, 830, 850, 860, 870, 980, 1,000, 1,070, 1,000, 1,130, 1,150, 1,170, and 1,190 kilocycles. The power of the Class I stations on these channels shall not be less than 50 kw.

"(b) To each of the channels below there may be assigned Class I and Class II stations: 680, 710, 790, 970, 1,020, 1,040, 1,050, 1,060, 1,080, 1,100, 1,110, 1,140, 1,160, 1,180, 1,460, 1,470, 1,480, and 1,490 kilocycles. Code of Fed. Rm. (Supp. 1939) 2742, 2744.

[2] See note 1 *supra*. Various contentions made with reference to this change, as being one in policy, "legislative" or "judicial" in character, made upon hearing before an improper official, *i. e.*, an examiner, etc., are not considered herein, since other and more important issues are sufficient to dispose of the appeal.

[3] Par. B, 8 (d) of Part II of this treaty provides: "If within the period of this Agreement the country to which a clear channel has been assigned shall have made use of the channel but not in the manner above described or not to the extent required by the provisions of this Agreement, such country shall be considered as having relinquished that portion of the rights which it has not used and at the expiration of this agreement, the other countries party thereto shall have the right, if they see fit, to withdraw the unused privileges from such country and to reassign them to any or all of the other interested countries.

ceedings of which it has been deprived either arbitrarily or erroneously. The case therefore raises again the troublesome question concerning who is entitled to appeal from the Commission's orders and upon what showing, under the nebulous provisions of the statute in this respect;[4] and the equally difficult, perhaps more unsettled inquiry, who, if anyone, may intervene as of right in its proceedings for granting, denying or modifying a license under the equally cloudy provisions relating to these matters.

I. *The Right to Appeal*

Appellant has standing to appeal. The statute confers this upon a "person aggrieved or whose interests are adversely affected." Section 402 (b) (2). In *F. C. C.* v. *Sanders Brothers Radio Station*, 309 U. S. 470 (1940), the Supreme Court held that the licensee of a competing station likely to be financially injured qualifies for appeal. It went further and asserted that Congress "*may have been* of opinion that one likely to be *financially* injured by the issue of a license would be the *only* person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license." (Italics supplied.) "Financially" was inserted by amendment of the opinion after the decision was first handed down. It does not follow that this guarded and speculative dictum makes economic injury the sole criterion of status to appeal, as the Commission and WHDH contend. The *Sanders* case involved on its facts only financial injury. The court held that sufficient. Though it suggested the possible insufficiency of other kinds of injury, no question concerning them was before it. The decision therefore cannot be taken as deciding such an issue.

There are strong reasons why the dictum should not be accepted as either stating or forecasting the law. Nothing in the statute specifies or requires a showing of financial injury as the exclusive basis to appeal. Nor are the hypotheses tenable that such injury is the only sort, of a substantial kind, likely to occur or that only persons financially hurt will be able or likely to appeal. It is true they probably will have the financial resources necessary for litigation. It does not follow that others, who may be affected adversely though not financially, will be neither willing nor able to appeal.

The contrary assumption ignores the facts that radio broadcasting is not exclusively a matter of business or financial gain, and that it is the public interest, not the private right, which is primarily at stake upon the appeal. Unfortunately, commercial enterprise has taken over the lion's share of the field. Unfortunately, because, when radio was in its infancy, many persons hoped that much of its work would be done by educational, religious and eleemosynary institutions, more than the event has permitted. Notwithstanding the policy which has

[4] The question has been presented here and in the Supreme Court in numerous cases. *E. g.*, Sanders Bros. Radio Station v. F. C. C., 70 App. D. C. 297, 106 F. (2d) 321 (1939), *rev'd on other grounds*, 309 U. S. 470 (1940); WOKO, Inc. v. F. C. C., 71 App. D. C. 228, 109 F. (2d) 665 (1940); Yankee Network, Inc. v. F. C. C., 71 App. D. C. 11, 107 F. (2d) 212 (1939); Stuart v. F. C. C., 70 App. D. C. 265, 105 F. (2d) 788 (1939); Pittsburgh Radio Supply House v. F. C. C., 69 App. D. C. 22, 98 F. (2d) 303 (1938); Red River Broadcasting Co. v. F. C. C., 69 App. D. C. 1, 98 F. (2d) 282 (1938), *cert. denied*, 305 U. S. 625 (1938); Pulitzer Pub. Co. v. F. C. C., 68 App. D. C. 124, 94 F. (2d) 249 (1937).

so favored commercial operators, there is a considerable volume of noncommercial broadcasting. It takes place through stations supported not by advertising or "plugs," but by churches, universities, colleges, charitable foundations and others who have no profit-making revenues. Many still hope that the evils apparently inherent in commercial broadcasting yet may bring about a larger allocation of frequencies to licensees whose objects are not primarily the making of money.

Limiting appeals to persons financially injured would have the practical effect of denying them to nonprofit-seeking broadcasters. Conceivably, in very rare instances, such operators could show financial injury. But obviously they could not do so in the circumstances in which commercial stations are able most frequently to demonstrate its possible incidence. The view cannot be accepted that these stations can appeal only when some action of the Commission has the practical effect of destroying their capital investment. Such a view would not be consistent with the public interest and right which is the foundation of all broadcasting and which primarily the commercial broadcaster's appeal is designed to protect. *F. C. C.* v. *Sanders Bros., supra.* The latter is likely to utilize the public interest as a vehicle for protecting his private standing, however tentative that may be in legal status. Few business institutions rush to the defense of the public weal when they are not affected in any private way. As between such operators, therefore, and the noncommercial broadcaster, the latter cannot be held a knight unworthy, unable or unwilling to battle for the general good in the lists of appellate litigation. Congress had no intention to exclude nonprofit stations from taking appeals, either absolutely or in practical effect. And if they can appeal by showing other than financial injury, so also can commercial operators.

Absence of economic injury however does not amount to presence of other sufficient injury. Appellant asserts it is enough that the order creates electrical interference. This the Commission now denies, in reversal of its apparent position prior to the *Sanders* decision.[5] Appellant argues that electrical interference, regardless of amount or effect, creates the right of appeal. To support this it points out that the whole occasion for regulation, including the feature of license, arises from the limited number of frequencies and the chaos electrical interference would cause, indeed did cause,[6] if there were no authority vested with power of license, allocation and police.

It is not necessary, however, to go so far with appellant. In the present stage of radio, very few changes, either in frequency or in power, can be made without creating some degree of electrical interference. This may range from minute and practically harmless interruption with remote and very occasional listeners in secondary ser-

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[5] The controversy in that case, and previously, concerning Section 402 (b)(2) was with reference to whether financial injury was sufficient, it being apparently the Commission's position that injury from electrical interference was the most that Congress had in mind in enacting this section.

[6] Prior to the Radio Act of 1927, and following the decision in United States v. Zenith Radio Corp., 12 F. (2d) 614 (N. D. Ill. 1926), and the Attorney General's opinion, Ops. Att'y Gen. (1926) 126. See Monograph of the Attorney General's Committee on Administration Procedure, Part 3, Federal Communications Commission (1940) 83.

vice areas to total obliteration in the primary field. Notwithstanding the Commission's apparently contrary view,[7] the latter effect would appear to be more than sufficient for appeal, whether or not a showing of financial injury could be made. Likewise, at the other end, it seems doubtful that an infinitesimal amount of new electrical interference should create standing to appeal.

Presumably by the decision in the *Sanders* case the Supreme Court intended that the financial injury must be something more than nominal or highly speculative. It seems not unreasonable to read the opinion as requiring by implication that there be probable injury of a substantial character. So much by way of limitation seems necessary to prevent vindication of the public interest from turning into mass appeals by the industry at large, with resulting hopeless clogging of the administrative process by judicial review. Likewise, with electrical interference, it is hardly necessary to secure appellate championship by every broadcaster who may be affected in only a remote and insubstantial manner. It follows that electrical interference, without a showing of financial injury, may be sufficient to create standing to appeal. But for this purpose there must be a reasonable possibility that it will be substantial. And this must appear, as we have held, from the notice of appeal and statement of reasons. *Yankee Network, Inc.* v. *F. C. C.*, 71 App. D. C. 11, 107 F. (2d) 212 (1939).

In this case the notice sufficiently discloses appealable interest. It states that appellant is aggrieved and its interests are adversely affected by the order and by its reaffirmance on denial of appellant's petition for rehearing; sets forth in detail the nature and steps of the proceedings before the Commission; and states, among reasons relied upon, that the order:

"(a) Results in *a substantial* modification of the license held by appellant . . . without having afforded it an opportunity to be heard as required by Section 312 (b) of the Communications Act of 1934." (Italics supplied)

"(b) Results in a change in the class and character of the frequency . . . without consent or hearing as required by Section 303 (f)."

"(c) Results in a degradation of service on 830 kc (850 kc) which will be prejudicial to the priority rights of the United States on this channel under Paragraph B 8 (d) of Part II of the North American Regional Broadcasting Agreement without affording appellant an opportunity to be heard on its own behalf and on behalf of the listeners it serves."

"(d) Results in a discrimination against service to rural listeners in order to furnish additional service to the residents of the City of Boston and as such is violative of the requirements of Section 307 (b) of the Communications Act of 1934."

Other assigned reasons include assertedly improper procedures in changing Commission policy, failure to return the application as required by its rules, amendment of the rules under improper notice, insufficiency of the evidence to support the decision, denial of hearing according to due process of law, etc.

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[7] The Commission's position that only financial injury, whether or not resulting from electrical interference, is sufficient for appeal necessarily means that electrical interference without financial injury, regardless of the extent or effect of the interference, would be no basis for appeal. Generally, of course, extensive interference would cause financial injury. But it is not clear this would be true of nonprofit stations or necessarily, perhaps, always in other cases.

On its face, therefore, the notice charges that the order substantially modified the license of KOA, changed the class and character of its frequency, degraded the station's service under the North American Agreement; jeopardized thereby not only appellant's rights but the priority rights of the United States and therefore the interests, present and future, of the listening public, and created discrimination against rural and in favor of urban listeners contrary to statutory requirements. These reasons appear to be a sufficient showing of both private and public interest and of adverse affectation to sustain the appeal. They require that it be considered on the merits, that is, on the question whether appellant was wrongfully refused a hearing before the Commission.

II. *The Right to Hearing*

The extent of the conflict concerning intervention appears from the extreme positions taken by appellant, on the one hand, that such a right arises from the Fifth Amendment as a matter of due process of law, and by the Commission and WHDH, on the other, that Congress has given the former an absolute discretion which nothing in the Constitution inhibits or limits.

It is said that existence of a right of appeal presupposes a right to intervene. The statute does not expressly so provide. But in view of our conclusion, for reasons to be stated, that appellant was entitled to intervene, it is not necessary to decide whether in some unusual circumstance one not entitled to become a party might appeal.

On the other hand, the Commission's argument is untenable that appellant has no right to be heard because it has no vested right in the frequency, or in its license or status thereunder, *F. C. C.* v. *Sanders Bros., supra,* or because the statute empowers the Commission to make rules and regulations, Section 154 (i), and to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Section 154 (j). The fallacy is that one who has no such vested right has therefore no procedural protections in relation to the more tenuous rights, privileges or status he possesses.[8] Whatever its proper label, "qualified right," "privilege," "status," "licensee," appellant acquired something of value by virtue of its license and the statute. The label is not important. The fact that appellant has fulfilled statutory conditions and has received statutory advantages, status and protections is important. *Tutun* v. *United States,* 270 U. S. 568 (1926). That it may be deprived of these and that the Commission has discretion to take them away, wholly or in part, do not mean that it can do so in an unfair manner or without hearing.[9] The protections of procedural due process do not disappear because the substantive right affected is not a full-grown vested right like that in one's castle at the common law. The right of appeal in capital criminal cases is entirely statutory. But that does not put it entirely beyond constitutional limitation. *Cf. Boykin* v. *Huff,* 73 App. D. C. 378, 121 F. (2d) 865 (1941), and au-

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[8] See Davis, *The Requirement of Opportunity to be Heard in the Administrative Process* (1942) 52 YALE L. J. 1093, 1118-25, and authorities cited and discussed therein.

[9] *Ibid.*

thorities cited. Similarly, though statutory rights in the nature of occupational license, revocable in administrative discretion, may not be "property" for purposes of protections afforded by substantive due process, they are not unguarded against arbitrary administrative action.[10] Procedural due process protects them against this, and does so notwithstanding the broad rule-making power and discretion given the Commission concerning the manner of conducting its business.

The crucial issue therefore comes down to whether appellant has been deprived of an opportunity for a fair hearing to which it was entitled either by the statute or by elementary due process. The two prongs of the question may be considered together. It will aid first to set forth the statutory provisions concerning hearing and those provided by the Commission's Rules and Regulations which are pertinent both to hearing and to intervention. These then may be considered in the light of what was done by appellant and the Commission.

A. The Statutory Provisions and Scheme of Hearings

Provisions concerning hearings are contained in Sections 309 (a), 303 (f), 312 (a), (b), and 409 (a) of the Act,[11] in addition to Section 154 (i), (j) referred to above.

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[10] *Ibid.*

[11] 48 STAT. 1082, 1085, 1086-7, 1096 (1934), 47 U. S. C. §§ 303 (f), 309 (a), 312 (a), (b), 409 (a) (1941).

§ 303 (f). "Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however*, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with."

§ 309 (a). "If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

§ 312 (a). "Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this chapter or of any regulation of the Commission authorized by this chapter or by a treaty ratified by the United States: *Provided, however*, That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation."

Section 309 (a) relates to applications for license, for renewal and for modification. The Commission is authorized to issue, renew or modify the license if, *upon examination of the application*, it determines that public interest, convenience or necessity would be served by *granting* it. If it does not reach *such* a decision on examining the application, then it must set the matter for hearing, "notify *the applicant* . . . and afford *such applicant* an opportunity to be heard under such rules and regulations as it may prescribe." (Italics supplied)

Under Section 303 (f) the Commission is authorized to "make such regulations *not inconsistent with law* as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act," but with the proviso that "*changes in the frequencies, authorized power, or in the times of operation* of any station shall not be made without the consent of *the station licensee* unless, *after a public hearing*, the Commission determines that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with. . ." (Italics supplied) These are the most important provisions presently involved.

Section 312 (a), (b) requires hearing with notice to the station licensee when revocation or modification of license is proposed. In the case of modification the licensee is to be "given reasonable opportunity to show cause" why the order should not issue, after having notice in writing.

By Section 409 (a) a commissioner or examiner or the director of a division is empowered, when designated by the Commission, to hold hearings, except an examiner may not do so in administration of Title III with respect to a matter involving: "(1) a change of policy by the Commission, (2) the revocation of a station license, (3) new devices or developments in radio, or (4) a new kind of use of froquencies. In all cases heard by an examiner the Commission shall hear *oral arguments* on request *of either party.*" (Italics supplied)

As has been noted, Section 154 (i), (j) confers broad power upon the Commission to make rules and regulations, issue lawful orders and determine the manner of conducting its business.

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§ 312 (b) "Any station license after June 19, 1934, granted under the provisions of this chapter or the construction permit required hereby and after such date issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

§ 409 (a). "Any member or examiner of the Commission, or the director of any division, when duly designated by the Commission for such purpose, may hold hearings, sign and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Commission; except that in the administration of sections 301-362 of this title an examiner may not be authorized to exercise such powers with respect to a matter involving (1) a change of policy by the Commission, (2) the revocation of a station license, (3) new devices or developments in radio, or (4) a new kind of use of frequencies. In all cases heard by an examiner the Commission shall hear oral arguments on request of either party."

Before turning to the regulations we may note that Section 309 (a) does not *in terms* guarantee an applicant or anyone else a hearing in all cases. The matter may be determined upon examination of the application, if in that manner the Commission is able to conclude that the application should be *granted*. In other words, the applicant is not entitled to a hearing if the action is to be in his favor. On the other hand, if the Commission cannot decide for him by merely examining the application, it must afford *him* a hearing with due notice. In short, it cannot deny the application without a hearing and the applicant is a necessary party. Whether other persons who may be affected, including existing licensees, are or may be entitled to a hearing is not determined explicitly or perhaps implicitly by this section. It is primarily an applicants' section and deals chiefly, though not necessarily exclusively, with applicants' rights.

Section 312 (a) (revocation), (b) (modification), on the other hand, deals primarily with rights of existing licensees. Hearing on notice is prescribed. When the question is modification *the licensee* must be given "reasonable opportunity to show cause" why the order should not issue. When it is revocation the hearing is to be "conducted under such rules as the Commission may prescribe." In contrast with Section 309 (a), Section 312 deals expressly and therefore primarily, not with applicants and their rights, but with licensees and their rights. Under the one applicants cannot be affected adversely without a hearing; under the other licensees cannot be so affected by revoking or modifying the license without a hearing. Neither section purports to make the hearing provided *ex parte* or to limit it in the one case to applicants, in the other to licensees. But neither purports to bring in others or give them a right to come in. Though others are not expressly excluded, the theory seems to be in each instance that the hearing is principally, though not necessarily exclusively, for the benefit of the applicant in the one case, of the licensee in the other. Neither section is designed on its face explicitly to take care of the situation where the interests of an applicant and an existing licensee, or of two licensees clash or may do so.

Section 303 (f) is in terms, particularly of the proviso, much like Section 312 (a), (b), in that it provides expressly for public hearing concerning "changes in the frequencies, authorized power, or . . . times of operation," unless "the station licensee" consents to the change. It is not stated explicitly that he is entitled to notice and participation in the hearing, but that seems clearly implied from the provision for hearing and prohibition of these changes without it unless he consents. Furthermore, the section contains no explicit statement concerning notice to or participation by any other person. On its face therefore the provisions of Section 303 (f) concerning hearing and the licensee's participation are much like those of Section 312 (b) dealing with modification, though in terms they are not entirely identical.[12] In a broad sense both may be said to deal with

[12] Section 312 (b) is cast in terms of notice and "to show cause," specifying that notice be given the operator whose license is to be modified. Section 303 (f) has no express provision for notice and merely requires "public hearing" when "the station licensee" does not consent to the proposed change. Section 303 (f) also deals only with "changes in the frequencies, authorized power, or . . . times of operation," not broadly with *modification* of station *license*, as does Section 312(b). Section 303(f) is not limited in terms to changes made *in the license* itself, while Section 312(b) is so limited in its terms.

modification and both to require hearing, unless the licensee affected consents to the change. This is true, notwithstanding Section 303 (f) in its principal grant of authority is, as is noted later, primarily a rule-making or "legislative" section, and the proviso is in one aspect a limitation upon the Commission's rule-making power.

But to regard Section 303 (f) as merely a duplicate or alternative provision to Section 312 (b), for protection of the licensee when his license is to be modified adversely, would make it practically superfluous. This would also ignore the primary clause and purpose of Section 303 (f), as well as the differences in express terms of the two sections.[13] The proviso is merely an incident or a limitation of the main provision, which is a grant of power to the Commission to "make such regulations *not inconsistent with law* as it may deem necessary *to prevent interference* between stations and to carry out the provisions of this Act." (Italics supplied) The principal concern of the section is interference, and the limitations of the proviso, including the requirement of hearing, relate to matters most likely to cause and most directly related to interference. In contrast with Sections 309 (a) and 312 (b), which are primarily one-party sections, Section 303 (f) deals with subject matter which necessarily involves at least two private parties in addition to the Commission, with the principal occasion for difference and dispute between or among them, namely, interference, and with the chief causes of this. The section is therefore basically a two-party or multiple-party section, not counting the Commission. This is true notwithstanding the primary clause is cast in terms of delegating rule-making power to the Commission concerning the subject matter. It is nevertheless multiple-party subject matter. The parties affected may be two or more existing stations, or they may be one or more such stations and an applicant or applicants for license. The section does not literally designate others than "the station licensee". But it necessarily contemplates, from the very nature of the subject matter, that others similarly situated will be similarly affected, and the only persons who may be so affected are other licensees and applicants.

In my judgment this fact is of paramount importance, for determining both what is meant by "changes in the frequencies, authorized power, . . . times of operation" and the nature and character of the hearing required, each a matter in fundamental dispute here. Conceding, as I think we may, that Sections 309 (a) and 312 (b) are primarily one-party sections, that is, they involve ordinarily one party in addition to the Commission itself, and the hearings they provide are chiefly, though not necessarily exclusively, for determining matters in the first instance between the Commission and an applicant in the one case and it and a licensee under prospect of having the terms of his license changed in the other, Section 303 (f) is from the outset no such one-sided matter. It is essentially one which from the start raises issues affecting not only the Commission, but also other persons who as among themselves are opposed in interest. The conflict is not, even in the initial stage, merely Commission-applicant, as in Section 309 (a), or Commission-licensee, as in Section 312 (b). It is Commission-licensee-applicant or Commission-licensee-licensee. It is three-way, and it may turn out to be adverse three ways.

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[13] See note 11 *supra*, and *circa* note 12 *supra*.

In my opinion this paramount fact makes the hearing provided by Section 303 (f) an essentially different kind of hearing or stage in hearing from those provided and required by Sections 309 (a) and 312 (b). In the first place, it differentiates that hearing from the one provided by Section 312 (b) and prevents it from becoming a mere duplicate or alternative of the latter. If their issues, purposes and application were identical, there would be no need for two such explicit, and to some extent inconsistent, provisions for hearing. The mere fact that the modifications which might be involved in the hearing under Section 312 (b) are broader and more inclusive than those specified in Section 303 (f) does not explain the duplicate provision, since the latter includes the most important respects in which modification might be required under Section 312 (b). But beyond this, the two sections have or are likely to have entirely different consequences. Many of the modifications which may be proposed under Section 312 (b) relate to matters affecting only the Commission and the particular licensee, in other words, do not affect other licensees or applicants. They involve such things as equipment, observance of regulations in broadcasting, etc., essentially Commission-licensee issues and only such. Hence, in these cases, there would be no need for giving notice and right to participate to other persons. Consequently provision for such notice and participation was not included and the Section provides these protections only for the person necessarily and ordinarily affected, the licensee faced with possible modification of the terms of his license. It does not exclude others, but it gives them no right to come in at this stage. The Commission may permit them to do so in its discretion. But it is not required to admit them until it becomes apparent their rights also may be affected.

It would be a very strange thing, however, for Congress to insist upon notice and hearing when the issues lie merely between the Commission and one party, whether applicant or licensee, and to ignore entirely or fail to make similar provision in the much more highly controversial three-party situation. It would be even more strange for it to guarantee these safeguards to one of the parties in the latter situation, as against both the Commission and the other party interested, but deny it to the latter or leave his right to be heard entirely within the Commission's unlimited discretion, especially when he is or may be the only one adversely affected. In my opinion Congress did neither. Framing Sections 309 (a) and 312 primarily for one-way conflicts, it left the more complex multiple-party situation to be dealt with by Section 303 (f). And in doing so, while it gave the Commission large discretion and rule-making power, it provided specifically for public hearing upon proposed changes relating to the most important causes of interference and of conflict and dispute between licensees or between them and applicants. This section therefore is distinguishable from Sections 309 (a) and 312 (b), in necessarily bringing together from the start the private parties with clashing interests, as well as the Commission with which each may be at odds, and in providing a hearing for disposition of these issues. Congress, in providing for this hearing, did not intend only one of the affected partes to have notice and be heard.[14]

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[14] This view derives some support also from the provisions of Section 409(a), note 11 *supra*, that "In all cases heard by an examiner, the Commission *shall* hear oral arguments on request *of either party*," explicitly recognizing the right of more than one person to be a party. (Italics supplied)

The section is not aptly drawn, particularly in the language which provides for the hearing. But only superficial reading would lead to the conclusion that only one of the interested parties is given right to a hearing. Literally read, the section merely requires a hearing if the changes specified are to be made "without the consent of the station licensee." There is no provision, as there is in Sections 309 (a) and 312 (a), (b), for notice or for any specified person to be heard. As has been said, it is only by implication from the condition of "the station licensee's" failure to consent to the proposed change that his protections in these respects can be found within the section's terms. So much, however, is necessary, unless the "public hearing" is to be one at which no one but the Commission would have the right to appear and participate.

What is more important, the section does not in terms identify the "station licensee" whose consent is required if hearing is dispensed with and who, by implication, is entitled to hearing if he does not consent. Presumably, though by inference, he is or may be the licensee in the terms of whose license some change is proposed. But the section does not say this explicitly. In this respect also it differs in terms from Section 312 (b). The latter relates expressly to modification of "station license," and prohibits making the order until "the holder of such outstanding license" is given notice and hearing. No such explicit terms appear in Section 303 (f). It nowhere mentions "station license" or "modification" of license. It does refer to "station licensee," but in no way, except by possible implication, does it identify him as the "holder of the outstanding license" which is to be "modified" in terms, or exclude the licensee whose operations may be more seriously affected, even destroyed, by favorable changes made in another operator's license. In short, section 303 (f) is drawn in different terms and, in my opinion, for different purposes, from Section 312 (a), (b). Literally the hearing provision relates to "changes in frequencies, authorized power, or . . . times of operation," not to "modification" of outstanding licenses. Literally also it requires the consent "of the station licensee," if the change is made without hearing, and hearing if such consent is not given. But it does not specify whether the licensee is one in the terms of whose license a change is to be made or one only affected by a change made in another's license or by granting a new application. This further narrows the crucial issue.

The Commission asserts the only person entitled to hearing under Section 303 (f) is the station licensee in whose license the change is made. Hence, in its view, KOA had no right under the section to be heard, since there was no change in its license and it continued free to operate on the same frequency, power and time after WHDH's application was granted as before. This view is presented with vigor and combatted with equal force. Much of the argument revolved pedantically about the difference between "in" and "of," that is, whether "change *in* frequency" means "change *of* frequency," as if the two forms might not mean the same thing and that as well what the one as what the other asserts. The controlling principles of construction are greater than prepositional hairsplittings.

The Commission's interpretation, though possible upon the language, would ignore the fundamental character of the subject matter and of the controversies as well as the conflict of interests; make the

section's provision for hearing one-sided; exclude one of the private parties interested and, in some instances, as in this case, the only one adversely affected; make the section a merely narrower duplicate of Section 312 (b), without taking account of their differences in terms, purposes and ordinarily applicable situations; and, finally, so construed, there would be serious question concerning the Section's validity. That construction would create the incongruous situation that an applicant for a license and a licensee facing literal "modification" would be entitled by the terms of the Act to hearing before adverse action, but a licensee equally or more seriously "affected" by the granting of another's application or changing another's license favorably would have no right to be heard except in the Commission's discretion. Logically this would be true, notwithstanding the interference thus created might blot out the "affected" station's operations. In this view a commercial station could wipe out a nonprofit one completely by licensed interference and, under the Commission's argument that financial injury is the only basis for appeal, the latter would have no right to be heard before either the Commission or the courts. If the injured station were also a commercial one and could show financial injury, it could appeal, but would have no right to be heard before the Commission. If it could not show financial injury, it would be in the same boat with the nonprofit station.

Such a construction would run contrary to the policy of every other provision for hearing in the Act. Not only in Section 303 (f) itself, but in Sections 309 (a) and 312 (a), (b), the statute dispenses with hearing when the action to be taken is *favorable* to the person, whether applicant or licensee, whose interests are directly and immediately involved. It is zealous to provide for hearing when the decision is or may be adverse to him. Yet, in this situation, KOA is the only station adversely affected. The action is favorable to WHDH. It was merely an applicant. KOA was an existing station. As between the two, if either was entitled to the greater protection, it would seem to be KOA. If the action taken or proposed had been adverse to WHDH, it had a statutory right to hearing, and in fact the Commission respected it. Yet when it reached the point of proposed decision in WHDH's favor and adverse to KOA, it denied that the latter had any right to hearing, whether statutory or constitutional. This perverts the hearing policy of the Act. That is to dispense with hearing when decision is favorable to the one affected, to require it when it is adverse. Section 303 (f) is no exception. It does not specify in terms who shall be heard or have notice. But it provides for public hearing when the "station licensee" does not consent to the proposed change in frequency, power or time. It does not say "the licensee whose license is modified in terms." Unquestionably it includes him. But he is amply protected by Section 312 (b). Whether he or the other station or stations affected will be injured depends, not on the mere fact his license is altered, but on *how* it is changed, whether favorably to him or to the others. The Commission's view posits the right to hearing, not upon the question who is hurt or likely to be hurt, as do the other sections, but upon whose letter of license is altered or likely to be changed. It ignores realities, effects and consequences in favor of the formal and literal nature of the change "The letter killeth; the spirit keepeth alive."

Section 303 (f) does not in terms exclude the station licensee who is injured by changes favorable to other licensees or applicants. Such licensees may be the only persons injured or adversely affected by the action. In such a case (and this is one), to posit hearing upon the want of consent of the licensee in whose favor the decision is made would be to deprive the only person injured or capable of being injured, and through him the public he serves, of the right to be heard. Such a view would pervert the section into an instrument for suppressing all protest by the only person hurt or likely to be hurt, except possibly as he might raise his voice on appeal, and then only, in the Commission's view, to be met with the answer that he has no right to be heard before it. It would suppress also representation of the public interest which it is the primary purpose of the statute to protect and secure.

In my judgment therefore Section 303 (f) cannot be given the narrow construction, merely duplicating the function and purpose of Section 312 (b), for which the Commission and WHDH contend. In addition to its obvious injustice, contradiction of the statute's general hearing policy, failure to take account of the differences of the two sections in language, subject matter and character of the controversies dealt with, the Commission's view refuses to recognize that the fact of interference rather than mere literal change in the terms of a license is what causes harm and chaos to stations affected, to the industry, and to the public. If accepted, it would also raise serious question concerning the section's validity, both for want of essential minima of procedural due process in some opportunity to be heard as of right and for want of essential fair play in favoring one interested party unduly as against another. Neither preservation of the public interest nor of the Commission's broad power and discretion to conduct its functions in disposing of the public's business requires acceptance of an interpretation so doubtful and unfair.

The foregoing views necessarily contemplate that the hearing provided by Section 303 (f), under the proviso, has in such an application as this "quasi-judicial" rather than merely "legislative" effect. That is true, in my opinion, notwithstanding the Section's principal grant of power is to make rules. In such an application as this, the making of rules relating to the defined changes necessarily affects existing rights by changing them, and that is as true as if the change were made by order rather than by rule. When such an effect is achieved, whether by the one form of action or the other, the ordinary distinction between "quasi-legislative" and "quasi-judicial" action gives way before the elementary requirement that rights be not destroyed or impaired without hearing. The proviso requires hearing whether the change is in form "legislative" or "judicial."

B. The Regulations and Their Application

It remains to consider whether the regulations, as they have been applied, have violated appellant's right to a hearing. The construction given above to Section 303 (f) does not mean that every licensee who may be in some way, however minutely or remotely, affected by the change or who may consider or surmise that he will be affected, is entitled to a hearing or that the hearing must be a full-panoplied

judicial proceeding. Further questions therefore are: (1) What interest or injury must an affected licensee have, and how must this be disclosed, in order for him to assert the right to hearing; (2) what is meant by hearing; (3) when does the right arise and when may it properly be asserted?

Interference may affect only a few stations or many. With frequencies crowded as they are, a change in the frequency, power or time of one station may affect dozens, possibly hundreds of others, some seriously, some only slightly. Expedition of the Commission's functions requires that hearings not become radio conventions or interminable trials like some receivership proceedings. There must therefore be some limit to the number of persons entitled to participate as parties and to the extent to which those so entitled may take part.

Apart from applicants and licensees faced with modification or revocation of license, the statute makes no express provision for determining who may be necessary parties, whether by right of intervention or as persons entitled to notice and party status from the inception of the hearing. With the two stated exceptions, the Commission has treated the matter as one of intervention under rules prescribing the basis upon which "affected" stations and others may come in. Under its former regulation, Rule 105.19, Rules and Regulations (1935), disclosure of "a substantial interest in the subject matter" was sufficient. This proved unsatisfactory[15] and has been revised to add the requirement that the petition also show "the facts on which the petitioner bases his claim that his intervention will be in the public interest." Rules and Regulations (1939), Section 1.102.

The two regulations are alike in excluding persons who cannot show substantial interest. There would seem to be no valid objection to this. Participation as parties of persons only insubstantially or remotely interested or affected is not necessary for protection of either private right or public interest. Exclusion of such persons from participation as of right is necessary for efficient conduct of the Commission's functions and to keep the hearings within manageable bounds.

Affirmatively, however, the two rules operate differently. The practical effect of the old one (Rule 105.19) was that affected licensees became parties upon disclosing in the petition "substantial interest in the subject matter." Upon this showing, intervention became a matter of right. So effective, the rule may be taken as having complied with the implicit requirements of Section 303 (f). *Red River Broadcasting Co.* v. *F. C. C.*, 69 App. D. C. 1, 98 F. (2d) 262 (1938). Persons substantially affected by action proposed under that section had the right to come in. That it was exercised nominally as a process of intervention, by filing a petition showing the nature of their interest, rather than by receiving notice and being regarded as parties from the outset, was no more than a reasonable concession to the Commission's difficulty of ascertaining in advance who might be sufficiently interested and of confining the hearing within reasonable bounds. *Red River Broadcasting Co.* v. *F. C. C.*, *supra*.

[15] See MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, PART 3, FEDERAL COMMUNICATIONS COMMISSION (1940) 16 ff., GELLHORN, ADMINISTRATIVE LAW—CASES AND COMMENTS (1940) 511.

The new rule (Section 1.102), however, excludes persons substantially interested, including existing licensees "affected," unless the petition states facts to show their "intervention will be in the public interest." The intended purpose was to cut down the number participating under the old rule.[16] The language of the new requirement is ambiguous. If by it were meant that the intervenor must show that the public interest is tied up substantially with his private one, so that in the hearing he would be champion for both, perhaps the analogy to the conditions necessary for appeal, as stated in the *Sanders* case, would sustain the further limitation.

The rule, however, has not been so applied. The Commission has not interpreted it as calling merely for a statement of specific facts to show that the public interest is involved in the petitioner's operations, will be affected substantially and adversely by the change proposed, and consequently that the petitioner's participation will be in championship of both its own and the public interest. Rather, as counsel have stated the matter in the brief, the decisions denying appellant's right to intervene were "not based on appellant's lack of interest. The Commission held that whether or not appellant had a sufficient interest, it should not be permitted to intervene because it failed to show *how its participation in the hearing* would be *of any assistance in the determination of the issues involved.*" Referring to the practice under the former rule (Rule 105.19), it is also said that procedure "was abolished because it made impossible an efficient administration of the Act." And again, "It thus became apparent that interest alone was an insufficient test for intervention... Virtually every application involves many persons who claim to be interested... Most such applications are for facilities in a community which already has one or more stations which may be fearful of the petition . . . or are for facilities which cause electrical interference to existing stations. In many situations both factors combine to increase the number of potentially interested persons... In practically every instance the persons who claim interest in the proceedings are existing licensees whose private interests are promoted by protracted proceedings which delay as long as possible the establishment of competing facilities. In view of these facts there is no wonder that the old intervention rule did not conduce 'to the proper dispatch of business and to the ends of justice.'"

So applied, the rule comes down at best to one of efficiency, without controlling regard to interest, public or private, or how far it may be affected; at worst to one of mere convenience to the Commission in performing its functions. That this is the meaning and effect of the rule, as it has been applied, appears not only from the argument and the briefs, but also from the Commission's key decision in support of this policy, *In re Application of Hazelwood, Inc.* (Docket 5698), from the undue reliance placed in argument upon the breadth of the Commission's discretion and rule-making power, and from the action taken in this case.

A rule which posits the basic right of hearing exclusively upon mere convenience to the Commission or whether the petitioner's participation "will be of assistance to it in determining the issues,"

[16] *Ibid.*

leaving this to be determined solely in its discretion, is not reasonable. It is a denial of any right to hearing. That it may be inconvenient or time-consuming for such a body to hear persons substantially interested and affected, or that, in the Commission's exclusive discretion, they may not be able to aid it, furnishes no basis for refusal to hear their side of the case, whether on the facts or the law. Efficiency is not to be bought at such a price to essential fairness. *Cf.* Brandeis, J., dissenting in *Myers v. United States*, 272 U. S. 52, 240 (1926). If therefore the rule has been applied to appellant in this manner and with this effect, it has cause for complaint. Whether it has been so applied and with such consequence is the remaining question.

Upon that, the facts are important, as are also the questions whether appellant disclosed its own and the public interest and the affectation of both sufficiently. Involved also is the question of what kind of hearing appellant was entitled to have.

In my opinion there was no improper denial of hearing prior to the denial of the second petition for intervention filed December 16, 1940, when the Commission gave notice to KOA and others of its *proposed* findings and conclusions favorable to granting WHDH's application. Until then it was wholly possible the application, filed under Section 309 (a), would be denied. Until that time the proceeding was, as has been pointed out, essentially a one-way matter, involving questions primarily and initially between the applicant and the Commission. It had been unable to decide from the application in favor of the applicant. Accordingly, as the section required, it put the matter down for hearing and notified WHDH. It also gave notice to others who might be affected, including KOA, though the section did not in terms require this. Appellant then petitioned for intervention and the petition was denied, as were a petition to review this action and a motion by appellant to dismiss the application on the ground it did not conform to the rules. In none of this was there abuse of the Commission's powers or discretion or violation of appellant's statutory or constitutional rights. In this initial stage the burden was upon the applicant to convince the Commission *prima facie* that granting its application would be in the public interest. The very fact the matter was set for hearing was a tentative indication the decision would be adverse to the applicant.[17] WHDH had therefore the laboring oar. Unless and until it convinced the Commission there was apparently valid ground, at least a *prima facie* case, for granting the application, no harm was done or could be done to other stations. Hence, until it appeared from this initial stage of the total administrative process that some harm to KOA and others similarly situated possibly or probably would result, there was no essential reason either in due process or in the provisions of Sections 309 (a) and 303 (f) for bringing them in. Until then the Commission was entitled in its discretion, as Section 309 (a) contemplated, to treat the matter as one exclusively between itself and the applicant. So much by way of concession, not only to the terms and the general scheme of the statute, but also to efficiency in performing the Commission's functions, is reasonable.

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[17] Monograph of the Attorney General's Committee on Administrative Procedure, Part 3, Federal Communications Commission (1940) 13.

Concomitant with this view of the statute, however, is the requirement that the conclusions of law and fact reached by the Commission in the initial stage, concerning issues which might affect other parties substantially, should be tentative, not final and conclusive, if they were favorable to the applicant. This, in fact, appears to have been observed, since the findings and conclusions were issued as "proposed," not as final and decisive, and notice concerning the proposed action was given to affected persons.

At this point, however, the clash between the interests of KOA and WHDH, and their respective public constituencies, became apparent, with the possibility of the latter's success. WHDH had succeeded in discharging its initial burden. The necessary effect of action in its favor would be to create electrical interference with KOA and also to require its reclassification under the Commission's rules. At this stage, then, the matter had become one no longer primarily between WHDH and the Commission, but one primarily between them, on the one hand, and KOA and other stations adversely affected, on the other. Though the process initiated under Section 309 (a) would not become final and complete until conclusive decision had been made, the provisions of Section 303 (f) then first came compellingly into play, overlapping the final phase of the proceedings under Section 309 (a), and required that persons substantially and adversely affected by the proposed decision be given opportunity to present their side of the case.

At this point appellant filed its second petition for intervention, which was denied January 7, 1941. However, the order permitted it to file a brief *amicus curiae*. It did so and participated in this character in the oral argument upon the question of adopting the proposed findings. On March 27, 1941, the proposed findings and conclusions were adopted by a vote of three to two, with two Commissioners not participating. The members voting in the negative filed a vigorous dissenting opinion. 8 F. C. C. Rep. —— (1941). The decision became effective by formal order April 7, 1941. Appellant's petition for rehearing was then denied and this appeal followed.

In the final and decisive stage of the Commission's action, therefore, appellant was excluded as a party, notwithstanding it was permitted to file a brief and appear in oral argument as *amicus curiae*. Unless these concessions gave it all to which it was entitled by way of hearing, the exclusion cannot stand as justified. This is because the basis on which it was made was not valid. It is not necessary to regard Section 1.102 as invalid, since it may be possible to apply it with valid effect. However, the manner in which it has been applied, generally and in this case is invalid, as being contrary both to Section 308 (f) of the Act and possibly also to elementary fair play required by due process.

Conceding appellant's interest, its substantial character, not denying its substantial relation to the public interest or that this as well as appellant's private interest might be adversely affected by the order, the Commission refused to recognize appellant as a party on the ground its petition did not disclose facts to show how its participation in the proceedings would be helpful to or would assist the Commission in deciding the issues. It then belied this action by announcing in the order of denial that appellant might file a brief as *amicus curiae*.

In view of the basis for the Commission's action, it is perhaps not necessary to inquire whether the petition, under some other rule or some other interpretation of the present one, would be sufficient. It was denied for an invalid reason, and that in itself is error sufficient to require reversal, unless its effects were cured by allowing appellant to appear as *amicus curiae*.

The petition, however, more than complied with the rule, apart from the invalid interpretation. It set forth petitioner's interest as a dominant clear channel station on the frequency 830 kc, with freedom from interference at night; that granting WHDH's application would cause electrical interference; require change in classification of KOA's frequency under the Commission's rules; result in degradation of service on frequency 830 kc prejudicial to the priority rights of the United States under the North American Regional Broadcast Agreement; discriminate against service to rural listeners and in favor of urban ones already well served; and stated other reasons not necessary to repeat. This admittedly was sufficient to show the substantial character of petitioner's interest, and in addition its substantial relation to the public interest, including service to rural areas, possible discrimination against them in favor of urban regions, and possible injury to the nation's priority rights under the international treaty, together with possible or probable substantial injury both to appellant privately and to the public interest. So much appearing, the petition complied in every respect with Section 1.102, except the construction that "intervention will be of assistance to the Commission in its own judgment" or "will be convenient for the Commission." The petition therefore complied with the rule in all its valid aspects, and should have been granted.

The Commission argues, however, that appellant was accorded in substance its full right to hearing, notwithstanding it was excluded as a party, because, first, it was allowed to file a brief and to appear in oral argument as *amicus curiae;* and, second, under Rule 1.195 appellant had, but failed to exercise, the right to present such evidence as it might choose to submit. Rule 1.195 provides for maintaining in the office of the secretary a record of all communications received relating to the merits of any application, together with the names and addresses of the senders. When the date for hearing is set, the secretary is required to notify these persons that they will have opportunity to appear and give evidence. Under the rule they are not precluded "from giving any relevant and competent testimony" because they lack "a sufficient interest to justify . . . intervention as a party. . ." In view of these things the Commission says appellant had, but waived, full opportunity to present evidence, and had also full opportunity for argument, oral and written, upon the legal issues—thus, in effect, to appear upon both the facts and the law. It asserts therefore that appellant actually was deprived of no substantial right. This presents the final refinement of the issue.

Appellant claims too much. The petition, among other things, sought to "reopen the proceeding in order to afford petitioner an opportunity to introduce evidence, to cross-examine all witnesses, and otherwise participate fully in the proceedings; upon such record file proposed findings of fact and conclusions of law; have the right to file exceptions to any proposed Commission decision thereafter issued; request oral argument upon such proposed decisions and upon

its exceptions thereto; in all respects participate fully in the important issues involved in the application" of WHDH. In short, appellant sought not only to participate as a party in the final and crucial stage of the process under Section 303 (f), but also to reopen, repeat and participate in the initial stage under Section 309 (a) as fully as would a party in judicial proceedings in equity with the rights to present evidence, cross-examine witnesses, including all who had been heard previously, take exceptions, submit findings, take part in argument, etc. Such a view of the proceedings would convert them essentially into a judicial trial in the final stage for reexamination *de novo*, so far as appellant might demand, of issues and matters presented in the initial one. In my judgment no such extensive right of participation is contemplated by Section 303 (f) or any other section, or is required by due process, and to enforce it would pervert the statutory scheme, convert the requirement of fair administrative hearing into one for a judicial procedure, and bring about a clogging of the Commission's work and functions inconsistent with their nature, complexity and due performance.

Both the Commission and appellant therefore have gone too far in their positions. On the one hand, appellant's right to hearing is not conditioned absolutely in the Commission's discretion, as it would be if limited to participation in argument as *amicus curiae* and in presenting facts under the provisions of Rule 1.195, applicable to all members of the public. Its right to participate is to do so as a matter of right, not of grace, and as a party. That is true, notwithstanding the extent of participation allowed as a matter of grace or discretion may be substantially or nearly identical with what the party is entitled to have as a matter of right. On the other hand, appellant is not entitled to a full-dress judicial proceeding or to dictate the extent of its participation, without regard to reasonable limitations which may be imposed by the Commission to achieve orderly and not unduly extended hearings. Some middle ground therefore must mark out the boundary between appellant's right and the Commission's power.

It would be enough to dispose of the appeal that appellant was excluded from appearing as a matter of right and allowed limited participation as a matter of grace. But to do this, without more, would leave the further proceedings in doubt. Two problems must be distinguished, one the determination of appellant's right to participate, the other the extent of that right. The former is not a matter of discretion with the Commission. One in appellant's position must be heard upon issues such as this proceeding involved in the final stage, under Section 303 (f). But that right is not inconsistent with the Commission's requiring its existence to be shown by something more than mere general allegations that the holder is substantially interested, will be substantially affected, and that the public interest is involved and will be likewise affected. If this were all that could be required, practically everyone affected in any way, immediately or remotely, substantially or slightly, could come in at his option by alleging these generalities. On the other hand, it is not necessary to set forth the evidence which would be presented on the merits, nor would requiring this be reasonable. Between these two extremes a middle ground may be found to enable the Commission to determine that the interest and the injury, public and private, are substantial

and real rather than insubstantial or visionary, and are substantially related. Perhaps an analogy can be taken from judicial proceedings in which findings of fact are required, in the distinctions which involve evidentiary facts, basic facts and ultimate facts.[18] There could be no undue limitation of the right to appear in requiring existence of the ultimate facts on which it is posited to be shown by statement of such basic facts, so that the Commission might be guided by something more than the vacuistic formulae of "substantial interest," "adversely affected," etc. So much at least would seem to be properly conceded, not to the Commission's discretion, but to the necessity that it be enabled to distinguish with reasonable certainty between persons entitled to come in as of right and others not so entitled but claiming this status on grounds insufficient once the actual facts of their situation become apparent. If at times there may be difficulty, as there is in judicial proceedings, in determining what are basic as distinguished from merely evidentiary facts, reasonable latitude toward including some of the more important of the latter will resolve it. The error if any should be made upon the side of stating more rather than less than may be actually necessary.

The other problem, involving the extent of the right to participate, is properly within the Commission's discretion under its broad rule-making power, reasonably exercised, beyond a few essential minima required by elementary notions of fair play. Neither the statute nor the Fifth Amendment prescribes specifically what these minima are. Nor has it been made clear by judicial decision what constitutes a minimum compliance with due process in the way of administrative hearing. Presumably this will vary to a considerable extent with the nature of the substantive right, the character and complexity of the issues, the kinds of evidence and factual material,[19] the particular body or official, and the administrative functions involved in the hearing. In other words, essential fairness of hearing bears some relation to these factors, but beyond certain, though very few, basic requirements which may be common to all fair hearings, the extent of participation by parties and others is a matter for regulation by statute or properly conferred rule-making authority.

The Communications Commission deals with highly technical and complex engineering and economic functions and relations, a highly organized and crowded industry serving primarily a public interest, but strongly affected with private incentive. Its functions are both regulatory and quasi-judicial. Its action in a single case often affects many persons, station licensees and others. Its hearings therefore tend to be many-party ones, in which each one appearing seeks as large a participation as possible. Often certain issues affect some, but not other parties. Yet once a party has come in, his tendency is to have a hand in all that goes on. Cross-examination especially lends itself to abuse in such a situation.[20] So does the opportunity to present expert testimony.[21] Consequently, in contrast with the fun-

[18] Saginaw Broadcasting Co. v. F. C. C., 68 App. D. C. 282, 96 F. (2d) 554 (1938).

[19] See Davis, *The Requirement of Opportunity to be Heard in the Administrative Process* (1942) 51 YALE L. J. 1093, 1106, 1117.

[20] *Id.* at 1103. MONOGRAPH, *op. cit. supra* note 17, at 16, 17.

[21] Particularly when the agency has a body of technical experts, such as the Commission's engineering staff, competent to give disinterested expert opinion upon the technical issues or questions. See MONOGRAPH, *op. cit. supra* note 17, at 19.

damental right to come in, to be present as a party and be heard, much in the way of discretion must be conceded to the Commission in controlling the extent to which parties may be allowed to participate. The Commission's objective of keeping the hearings within manageable bounds is to be achieved, therefore, not as has been attempted by excluding persons who rightfully should come in, but by controlling through reasonable regulation the extent to which they may take part. As to this the Commission has and rightfully may exercise much authority in various specific ways.

The essential minima for fair hearing would seem to include a reasonable opportunity to present evidence concerning disputed issues of fact and argument upon issues of law affecting the party tendering them, and to do both as a party to the proceeding, not merely in the character of one present on sufferance or favor. In neither respect however does this mean, as appellant seems to think, that a party may require retracing all steps taken before the stage at which his right to come in arises or that he may wander throughout the record upon issues affecting other parties, but not himself substantially.[22] In this case, therefore, it does not mean, as appellant assumed, that it could require the entire proceedings prior to the time of its proper intervention to be reopened with right on its part to cross-examine all witnesses heard in the preliminary stage under Section 309 (a) and, apparently, in its discretion to compel reproduction of all testimony then produced. Such a view would force the Commission to incur the waste of holding the preliminary hearing upon the application under Section 309 (a) and then repeating all that had been done in it when it becomes apparent, from the proposed determination favorable to the applicant, that the final stage of hearing under Section 303 (f) must be gone through with in order to afford one in appellant's position his opportunity to be heard.

The statute contemplates no such wasteful process, and in my opinion due process does not require it. Adequate protection for appellant's rights can be secured without this, and in full consonance with the statutory scheme. It contemplates, as has been said, a preliminary hearing in which only the applicant is required to be present as a private party. It may become final, if the decision is adverse to him. If so, others affected will not be harmed, and their presence in this stage would only clutter the proceedings and the record. If not, then appellant's right to hearing arises under Section 303 (f). But nothing in the act or in the Constitution requires this to be entirely *de novo*. It is enough that it be adequate.[23] At the proper stage of intervention, the record in the preliminary hearing has been made. It may be made available to the intervenor. From the multiplicity of evidence and of issues it is not unfair to require him to specify, at least in a general way, the issues he proposes to meet, the evidence he wishes to contradict, and other matters concerning which

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22 This seems implicit in the well-recognized rule that due process requirements are satisfied if at any time before governmental action becomes final, hearings are allowed either by administrative or judicial action, and therefore persons not directly or immediately affected in the initial stages of a hearing which involve primarily the interests of others may be excluded until a later phase when their interests become directly and immediately involved. See Davis, *op. cit. supra* note 19, at 1104, 1136-40, and authorities cited; MONOGRAPH, *op. cit, supra* note 17, at 20.

23 *Ibid.*

he wishes to raise objection. This should be done with particularity, not merely by broadside charge against the entire previous proceedings. With the issues so self-limited, it will then be for the Commission to determine whether, in the exercise of its quasi-judicial discretion, the intervenor's participation should be further limited, in relation to the production of evidence, cross-examination, argument or other normal incidents of hearing. In this manner each party may be restricted fairly to the issues and participation pertinent to his case, rather than allowed to roam through the entire proceedings upon matters relevant to others, but not to himself or matters concerning which he has no objection. Perhaps a considerable part of such confinement may be accomplished by the issuance of appropriate general regulations. But whether by that method or by action in the particular case, the result may be achieved of affording the intervenor fair and adequate hearing, without at the same time permitting him to run away with the hearing, nullify all that has gone before the intervention, or unduly extend the hearing beyond what fair protection of his rights and the public interest may require.

It is not necessary to extend the discussion further. Appellant has shown sufficiently its right to come in. It should have been allowed to do so, as a party to the proceeding, not merely as a friend of the Commission or a member of the public. That is true, notwithstanding the extent of participation actually allowed may have been substantially all that a party was entitled to have, though by this statement it is not intimated that this was true. That question need not be determined. It is one thing to be present as a party, and as a matter of right. It is another to appear upon favor or by sufferance. It is still another to be heard in a particular fashion or at a particular time or stage.

Appellant's right arose, not when the preliminary proceeding upon the application were begun nor when the matter was set for hearing, nor thereafter prior to issuance of the "Proposed Findings of Fact and Conclusions"; but when these were issued. At that time, upon the showing made in appellant's petition, it should have been recognized as a party and allowed to participate thereafter on that basis."

The extent of its right to participate, however, was largely within the discretion of the Commission, having due regard to the principles above stated. Appellant was not entitled as a matter of right to all of the relief demanded in its second petition to intervene or in the petition for rehearing, and upon another hearing may be required, in the Commission's reasonably exercised discretion, to confine itself as has been indicated, and to point out with reasonable particularity the portions and features of the previous proceedings it wishes to challenge.

This does not amount, in substance or effect, to acceptance of the Commission's view that appellant can be excluded for failure to set forth facts to show that its intervention will be of assistance to the Commisison in deciding the issues. That factor is pertinent to the question how far appellant may participate, though perhaps not con-

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" This statement is not intended as meaning that adequate hearing might not have been afforded at a later stage, by appropriate regulation, as upon petition for rehearing. *Cf.* United States v. Illinois Central Ry., 291 U. S. 457 (1934); Comment, *Necessity for Hearing Before Enforcing Order of Interstate Commerce Commission* (1934) 43 YALE L. J. 1300; Davis, *op. cit. supra* note 19, at 1136–40.

clusive of it. It is not the criterion of the right to be heard. It may, in fact, have exactly the opposite effect, that is, the intervention may present facts or legal argument, contrary to those tentatively accepted by the Commission, which will make its decision more difficult. That is one purpose of hearing. Nor does this view posit the right to be present and to take part upon an exercise of the Commission's discretion or favor. With that right established, every other has protection, and if there is violation by some attempted exercise of discretion in any other respect it may be corrected, first by argument before the Commission itself, or if it is not corrected there, then by appeal.

Without attempting therefore to blueprint the procedure to be followed with respect to the extent of appellant's participation in another hearing, we may leave such matters to the Commission's judgment, where they properly belong, subject only to compliance with the basic requirements of fair play and adequate opportunity to be heard.

For the error in excluding appellant from participation as a party in the final and controversial stage of the proceeding, contrary to the requirement of Section 303 (f) of the Act, the order must be reversed with directions to afford appellant opportunity for hearing in accordance with the provisions of that section.

Reversed and remanded.

Opinion

GRONER, C. J., and VINSON, J.: Judges Groner and Vinson concur in the conclusion of Judge Rutledge that appellant has not only a right to appeal to this court under Section 402 (b) (2) of the Act, but also the right to intervene in the proceeding before the Commission. We are, therefore, in agreement with Judge Rutledge that the case should be reversed and remanded for further hearing.

In view of the importance of the principles involved, we consider it desirable, however, to set out in a word our separate views as to the meaning and effect of those Sections of the Act upon which we all agree the decision must turn.

We are in agreement with Judge Rutledge that under Section 303 (f) the Commission should have accorded appellant the right to participate in the hearing as a party. But we are also of opinion that, since in the facts of this case it is apparent that the granting of the application of the Matheson Radio Company, Inc., operators of Station WHDH at Boston, would result in what amounts, if substance be regarded rather than form, to a modification of appellant's license, Section 312 (b) of the Act also provides a right of participation by appellant in the proceedings under that application. While the question is no longer material here—since we assume that, in the present state of the record, the Commission will re-open the proceedings and permit the intervention of appellant as a party—we express our disagreement with the view of Judge Rutledge that the Commission, in its discretion, may exclude appellant from participation until

the proposed findings of fact have been made. It is our view that participation in the hearing, under either Section 303 (f) or Section 312 (b), should have been accorded both to appellant and to Matheson Company from the outset. It is true that Section 309 (a) appears to contemplate that if upon examination of an application for a station license, or the renewal or modification thereof, the Commission shall make a determination in favor of the application, it need not accord a hearing to the applicant. But we think, whatever the effect otherwise of this section may be, it is inapplicable in the facts of this case. Here the application of Matheson Company for an extension of its facilities is in effect an application, as we have said, the granting of which will, if substance be regarded, modify the license of appellant. In the circumstances, we think Section 312 (b) is applicable and that both appellant and the Matheson Company were entitled to participate in the proceedings as parties and with the rights of parties. We think the statute contemplates that a licensee's right, although limited and defeasible, shall not be modified or destroyed without a hearing. To allow a hearing only after proposed findings of fact have been made is to deprive appellant of participation during the crucial period of the proceeding—that is, when the evidence is being taken and the record being made up. Appellant's interest existed from the beginning, and it is not enough that that interest was considered by the Commission. It is axiomatic that one whose rights will be affected, not only may himself engage in their protection, but must do so affirmatively and at every step in the proceedings—or take the consequences of his default. *Red River Broadcasting Co.* v. *Federal Communications Commission*, 69 App. D. C. 1, 98 F. 2d 282. There was no default in this case.

Opinion

STEPHENS, *Associate Justice:* I concur in the conclusion of Judge Rutledge that the appellant has not only the right to appeal to this court under § 402 (b) (2) of the Communications Act but that it had also the right to intervene in the proceeding before the Commission, and I am therefore in agreement with Judge Rutledge that the order should be reversed and the case remanded for further hearing. I am also in agreement with the views and conclusions expressed by Judges Groner and Vinson in their separate opinion. I desire to add the following:

I am aware that the provisions in the Communications Act for hearings speak *in terms* of licenses and rights which are undergoing alteration, suspension or revocation through direct action of the Commission thereon, and not *in terms* of the rights of existing licensees—such as those of the appellant—which will be impaired by the direct action of the Commission in extending the facilities of another licensee. But I think that by clear implication the safeguards of the Act operate for the benefit of such a licensee as the appellant. For it cannot be doubted that the modification—in the instant case the extension of facilities—of one license right may have the consequence of impairing, or even of destroying, the business of another licensee; this in practical effect is a modification or revocation of his

license. A contrary view would regard form rather than substance. That the granting of new or additional station rights may have the consequence of impairing or destroying the busines of an existing licensee is recognized in *Commission* v. *Sanders Radio Station*, 309 U. S. 470 (1940), where the Supreme Court, after stating that it is not the purpose of the Act to protect a licensee against competition but to protect the public, that Congress intended to leave competition in the business of broadcasting, stated also:

> This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service. . . . [309 U. S. 475–6]

It is true that in the *Sanders* case the statement is made that the policy of the Act is that no person is to have "anything in the nature of a property right as a result of the granting of a license." But the opinion in that case also recognizes that station licensees may be financially injured by the issue of a license to a competing station. The language first quoted must be read in connection with the opinion as a whole and in connection with the utterances of the Supreme Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940), and *Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266 (1933). In the *Pottsville* case the Court said: "To be sure, the laws under which these [administrative] agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing." In the *Nelson Bros.* case the Court said: "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision." In view of the *Pottsville* and *Nelson Bros.* cases, and in view of the provisions of the Communications Act which recognize rights, limited in time and quality by the terms of the licenses issued, in station licenses (see especially §§ 301, 309 (b) (1), (2), 319 (b)), I think it clear that a station license issued under the Communications Act for a definite term for the conduct of a broadcasting business requiring substantial investment is more than a mere privilege or gratuity. Whether or not it may be technically called a property right, it is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury. I think the Supreme Court in the *Sanders* case in its reference to the absence of "anything in the nature of a property right as a result of the granting of a license" was using the term property right in the sense of a right absolute or indefeasible. It is clear of course that under the Communications Act a station licensee's rights are subject to modification, or even to revocation, in the public interest. But I do not think the *Sanders* decision was intended to be taken

as meaning that no right even of a limited and defeasible nature exists in a licensee. Nor do I think that the decision was intended to mean that an existing broadcasting station and the investment therein may be injured or destroyed by the introduction of competition or through the extension or modification of the facilities of other licensees *without a hearing before the Commission on the question whether the public interest, convenience and necessity will be served by such injury or destruction.*

Even if the Communications Act were doubtful in its recognition of the existence of rights in licensees and in its provision for hearings upon the question whether the public interest requires the reduction or destruction of such rights, I think it would be the duty of the courts to construe the Act as recognizing such rights and providing for such hearings—and this for two reasons. First, in the absence of indubitably clear language requiring such a conclusion, it would be unthinkable to conclude that the Congress would provide for the granting of station licenses for radio broadcasting contemplating, in connection with operating a station, investment in building space and equipment, the hiring of talent, the contracting for advertising, and the employment of labor, but at the same time fail to recognize that by whatever technical name they might be called, whether property rights or license rights, interests would arise, in the persons to whom licenses were granted, which should as a matter of fair play not be impaired or destroyed by the Communications Commission without a hearing upon the question whether the public interest would be served by their impairment or destruction. Right to a hearing before injury by the government in the public interest is one of the fundamental decencies guaranteed by democratic institutions. It is the safeguard of the Anglo-American legal system against arbitrary or capricious action by public authorities. No purpose should be attributed to Congress to deny such a right. Second, to construe doubtful language of Congress as permitting the impairment or destruction of a licensee's interests without a hearing would be to invalidate, under the due process clause of the Fifth Amendment, the action of Congress. That that clause protects against the arbitrary impairment or destruction of substantial rights even though they are limited by the public interest, is not open to doubt. *Cf. Northern Cedar Co. v. French*, 131 Wash. 394, 230 Pac. 837 (1924).

Dissenting opinion

Mr. JUSTICE MILLER dissenting: I find no substantial allegation of injury in any of appellant's reasons for appeal. Surely it is not enough, to secure standing to appeal on the basis of affectation of interest or aggrievement, that electrical interference will occur beyond that previously occurring. Surely some injury, actual or anticipated, should be the minimum requirement. And if injury has occurred or is threatened, what other test or measure of its substantiality could there be than that it is financial?

In the *Sanders* case the Supreme Court said: "Congress had some purpose in enacting § 402(b)(2). It may have been of opinion that one likely to be *financially* injured by the issue of a license would be the *only person having a sufficient interest* to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license."[1] [Italics supplied.] Of course, stated as it is in speculative form concerning legislative purpose, it is possible to argue that this language was not intended to say that *only* a person likely to be *financially* injured has a sufficient interest, within the meaning of Section 402(b)(2). But I think that is exactly what the Supreme Court intended to say. As the Commission in its brief points out, the word financially, which I have italicized, was added after the opinion was first released.[2]

While intangibles such as prestige, or position, in the broadcasting world may seem valuable to a licensee, still they are unimportant—in view of that free competition which Congress intended should exist in the field of broadcasting—unless injury to them would result in financial injury. If, for example, loss of prestige should result in loss of advertising then, perhaps, a tangible injured interest would appear which would give standing to appeal. But if there is no interest, of such character, that it will reveal itself in terms of financial injury, then there is no sufficient interest to give standing to appeal.

This is true even of a licensee which is operating on a nonprofit basis, a college, a church, or a benevolent institution. Financial backing is required to maintain such a licensee. If the injury threatened endangers that financial backing then the licensee may have standing to appeal; otherwise not. Where else could the line be drawn? Would it be sufficient that a Methodist organization was aggrieved by hearing Baptist doctrine preached in the same listening area; or that one college should be disturbed by the songs and cheers of a rival institution of learning?

It is apparent in the present case, therefore, that unless electrical interference was likely to result in financial injury appellant was not an aggrieved or affected person within the meaning of the statute. And if financial injury was likely to result, the licensee could have spelled out that fact in his reasons for appeal. It imposes no undue burden upon one who seeks judicial review of the Commission's decision, to require that he specify clearly, unequivocally, precisely, the nature of his alleged injury. This, appellant has failed to do.[3] Consequently, I would dismiss the appeal.

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[1] Federal Communications Commission v. Sanders Brothers Radio Station, 309 U. S. 470, 477.

[2] See Federal Communications Commission v. Sanders Brothers Radio Station, 309 U. S. 642.

[3] Stuart v. Federal Communications Commission, 70 App. D. C. 265, 267, 105 F. (2d) 788, 790; Perkins v. Lukens Steel Co., 310 U. S. 113, 125: "Nor can respondents vindicate any general interest which the public may have in the construction of the Act by the Secretary and which must be left to the political process. Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law."

Dissenting opinion

EDGERTON, J., dissenting: I think that "person aggrieved or whose interests are adversely affected" contemplates a substantial injury as distinguished from a trifling or negligible one. I should suppose that interference *might* affect reception of KOA's signal so adversely, and over so large and important an area, as to cause substantial injury and give appellant standing to appeal, whether or not it caused financial loss. But interference is an elastic term; it may be of any degree. Some interference is minimal and practically harmless. Appellant's notice of appeal, though it alleges "substantial modification" of its license, alleges neither substantial injury nor any facts which constitute substantial injury. It alleges nothing more injurious that "interference to KOA in areas where KOA's signal is now interference free." This allegation would be supported if it were shown that in some small area, thousands of miles from Denver, and of no actual or potential importance to appellant, a few listeners could and did at rare intervals get, without interference, a feeble signal from KOA, and that their reception of that signal would be made a little worse by WHDH's modification. I think such an allegation would not show standing to appeal. Since appellant's actual allegation may mean no more, we can accept it as showing standing to appeal only if we waive the rule that pleadings are to be construed against the pleader.

If we take that step, I think we should affirm. I find nothing in the Communications Act which required the Commission to give appellant a hearing; quite the contrary. Yet the Commission gave appellant a hearing. It violated neither the Act nor due process.

The Commission was asked to and did modify the license of WHDH. Sec. 309 (a) of the Communications Act provides in effect that the Commission may grant, though it may not deny, an application for modification without a hearing. Most modifications of licenses affect other licensees, and Congress might easily have required that other licensees who stand to lose be given a hearing. It did not. So far as the Act is concerned, therefore, no hearing was necessary. True, Sec. 303 (f) requires that the licensee of a station be given a hearing if the Commission is to change that station's "frequencies, authorized power, or . . . times of operation." But that section is not applicable here, since neither the frequency, the power, nor the time of KOA, appellant's station, is being changed. Similarly, Sec. 312 (b) forbids "modification" of a license without opportunity to the licensee to show cause why the license should not be modified; but that section is not applicable, since appellant's license is not being modified in any particular.[1] Its license merely authorized it to operate with specified equipment, frequency, power, and time, and still authorizes it to operate with the same equipment, frequency, power, and time. To say that appellant's frequency or its license is being "changed" or "modified" seems to me an inapposite figure of speech. It is true that the Commission's rules, until they were changed in the course of these proceedings, stated that only one Class I station "will be assigned" to the frequency of 850 kilocycles. But that statement of the Commission's purpose or policy was not incorporated, or referred to, in appellant's license. Therefore the license cannot, un-

[1] Sec. 303, including (f) deals in a summary way with the "powers and duties of Commission." Sec. 312, including (b), deals in a detailed way with "revocation and modification" of licenses and with "notice and hearing."

less by a most liberal construction, be regarded as intended to make any exclusive grant to appellant, whether of equipment, frequency, power, or time. Appellant's license is no more exclusive in respect to frequency, power, and time than in respect to equipment. And the settled rule requires not a liberal but a strict construction of franchises and licenses.[3] Moreover, Section 301 of the Act provides that "no . . . license shall be construed to create any right, beyond the terms, conditions, and periods of the license," and the Supreme Court has said: "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public."[4]

The Constitution does not, in my opinion, give appellant a right to a full hearing, of the trial type, in the proceedings before the Commission. In the absence of statute, licensing authorities are usually under no duty to give any sort of hearing to license holders before changing rules which affect the value of licenses.[5] Appellant's case is somewhat similar to that of a licensed automobile operator who should demand that he be given a hearing before the speed limits are reduced. It is stronger in one respect; for appellant is, and the particular automobile operator is not more likely than anyone else to be affected by the change proposed. But it is weaker in another respect; for appellant is not, and the automobile operator is, forbidden to do after the change what he was free to do before the change. Only the consequences of appellant's activities, and not the activities themselves, are affected by the change which the Commission has made in the license of WHDH. Appellant is in substantially the same position as the owner of a licensed garage or liquor store who is subjected to new competition by the licensing of a similar business nearer his own than would have been possible under the regulations which were in force when his own license was issued.

It may be that appellant was, as a matter of due process, entitled to some sort of hearing. The Commission's proceedings had a fact-finding aspect, and were more likely to affect appellant's interests than those of any other person. But appellant was not entitled to a hearing which should include "the incidents of a trial in court."[6] Persons may be "heard" without being "permitted to intervene, and thus become parties."[6] Appellant was entitled to no more than a hearing reasonably adequate to protect its interests and reasonably practicable for the Commission and the public; in other words, to a fair opportunity to bring its facts and arguments to the Commis-

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[3] *Detroit United Railway* v. *City of Detroit*, 229 U. S. 39; *Piedmont Power & Light Co.* v. *Town of Graham*, 253 U. S. 193.

[4] *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 475.

[5] *Cf. Lacquer & Chemical Corp.* v. *Mills*, 22 F. 2d 697 (D. C. E. D. N. Y.), *affirmed*, 22 F. 2d 700 (C. C. A. 2); *certiorari denied*, 276 U. S. 617.

[6] *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 316, 317.

[6] *The Chicago Junction Case*, 264 U. S. 258, 268. "The 'hearing' is the hearing of evidence and argument." *Morgan* v. *United States*, 298 U. S. 468, 480.

sion's attention.[7] It had such a hearing—whether of right or of grace we need not inquire. Pursuant to the Commission's Rule 1.195, it was given an opportunity to appear and present evidence. It chose not to do so. It was permitted to, and did, file a brief and make oral argument. Nothing more was required. It was not formally a party, and some aspects of a trial at law, including opportunity for cross-examination, may have been absent. To rule, as the majority of the court in effect do, that the Commission's action was therefore erroneous, is to cramp the administrative process by forcing it into the very mold which it is designed to avoid.[8] Since the Commission had to decide primarily a question of policy and only incidentally a question of fact, the technique of a trial would have been clumsy and wasteful.[9]

[7] When an importer has contested the valuation of his goods by the customs service, and exercises his right to have them valued by appraisers, the question "is not to be tried before the appraisers as if it were an issue in a suit in a judicial tribunal." *Auffmordt* v. *Hedden*, 137 U. S. 310, 323. "If he "is afforded such notice and hearing as enables him to give his views and make his contention in respect of the value of his goods, he cannot complain." *Origet* v. *Hedden*, 155 U. S. 228, 238.

[8] *Cf. Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.

[9] *Cf. Davis, The Requirement of Opportunity to be Heard in the Administrative Process*, 51 Yale L. J. 1093, 1098.

Appellant could have had a hearing of the trial type if it had chosen to comply with the Commission's rule regarding petitions to intervene.

214 In United States Court of Appeals for the District of Columbia

Before Honorable D. Lawrence Groner, Chief Justice, and Honorable Harold M. Stephens, Justin Miller, Fred M. Vinson, Henry W. Edgerton, and Wiley Rutledge, Associate Justices:

NATIONAL BROADCASTING COMPANY, INC., APPELLANT

vs.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

and

MATHESON RADIO COMPANY, INC., BERKS BROADCASTING CO., INTERVENORS

Appeal from the Federal Communications Commission

Judgment

Sept. 12, 1942

This cause came on to be heard on the transcript of the record from the Federal Communications Commission and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said Federal Communications Commission in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded for further proceedings in conformity with the opinion of this Court.

Per Mr. JUSTICE RUTLEDGE.

Separate concurring opinion by Mr. Chief Justice Groner and Mr. Justice Vinson.

Separate concurring opinion by Mr. Justice Stephens.

Dissenting opinion by Mr. Justice Miller.

Dissenting opinion by Mr. Justice Edgerton.

Dated September 12, 1942.

[Title omitted.]

[File endorsement omitted.]

215 In United States Court of Appeals for the District of Columbia

Designation of record

Filed Dec. 5, 1942

The Clerk will please prepare and certify a transcript of record on petition for certiorari to the Supreme Court of the United States in the above entitled case, including therein the following:

1. The appendix to the brief of the intervenor, Matheson Radio Company, Inc., in the United States Court of Appeals for the District of Columbia.
2. The appendix to the brief of the National Broadcasting Company, Inc., in the United States Court of Appeals for the District of Columbia.
3. Minute entry of argument.
4. Opinion.
5. Judgment.
6. This designation.
7. Clerk's certificate.

216 CHARLES FAHY,
Charles Fahy,
Solicitor General.

Service of copy of the above designation of record in the above entitled cause is hereby acknowledged this 4th day of December 1942.

GEORGE B. PORTER,
GEO. O. SUTTON,
H. R. S.
PHILIP J. HENNESSY, JR.

217 [Clerk's certificate to foregoing transcript omitted in printing.]

October Term, 1942

Stipulation as to record on petition for writ of certiorari

Subject to the approval of this Court, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that, for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

1. The appendix to the brief of the intervenor, Matheson Radio Company, Inc., in the United States Court of Appeals for the District of Columbia, No. 7933.

2. The appendix to the brief of the National Broadcasting Company, Inc., in the United States Court of Appeals for the District of Columbia, No. 7933.

3. The proceedings in the United States Court of Appeals for the District of Columbia, No. 7933.

It is further stipulated and agreed that the petitioner will cause the clerk of the United States Court of Appeals for the District of Columbia to certify and file the entire transcript of the record now on file in his office with the clerk of this Court, and that in the event the petition for a writ of certiorari is granted, the
219 printed record shall consist of the proceedings in the United States Court of Appeals for the District of Columbia and such portions of the entire transcript of the record certified by the clerk of that court as the respective parties may designate.

It is further stipulated and agreed that either party may refer in the petition and briefs to any portions of the certified transcript of record which are not included in the printed record to be filed in accordance with this stipulation.

CHARLES FAHY,
Charles Fahy,
Solicitor General,
Counsel for Petitioner,
Federal Communications Commission.
PHILIP J. HENNESSEY, Jr.,
Counsel for Respondent,
National Broadcasting Company, Inc.
GEORGE B. PORTER,
Counsel for Intervenor,
Matheson Radio Company, Inc.
GEO. O. SUTTON,
Counsel for Intervenor,
Berks Broadcasting Company.

No. 585, October Term, 1942

Order allowing certiorari

(Filed January 18, 1943)

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

221 In Supreme Court of the United States

October Term, 1942

No. 585

Stipulation in re record on writ of certiorari

(Filed Jan. 27, 1943)

It is hereby stipulated and agreed by and between the attorneys for the above-named parties that the transcript of record filed in this Court with the petition for certiorari may be used in the hearing of this case on the merits and that no additional matter need be printed.

It is further stipulated and agreed that either party may refer in the briefs or oral argument to any portions of the certified transcript of record which are not included in the printed record to be filed in accordance with this stipulation.

CHARLES FAHY,
Charles Fahy,
Solicitor General,
Counsel for Petitioner,
Federal Communications Commission.

PHILIP J. HENNESSEY, Jr.,
Philip J. Hennessey, Jr.,
Counsel for Respondent,
National Broadcasting Company, Inc.

GEO. B. PORTER,
George B. Porter,
Counsel for Matheson
Radio Company, Inc.

GEO. O. SUTTON,
George O. Sutton,
Counsel for Berks
Broadcasting Company.

JANUARY 27, 1943.

[Endorsement on cover:] File No. 47086. U. S. Court of Appeals, District of Columbia. Term No. 585. Federal Communications Commission, Petitioner vs. National Broadcasting Company, Inc. (KOA), Matheson Radio Company, Inc., and Berks Broadcasting Company, Intervenors. Petition for a writ of certiorari and exhibit thereto. Filed December 12, 1942. Term No. 585 O. T. 1942.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 585

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL BROADCASTING COMPANY, INC. (KOA), MATHESON RADIO COMPANY, INC., AND BERKS BROADCASTING COMPANY, INTERVENORS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Federal Communications Commission, hereinafter referred to as the "Commission," prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled cause on September 12, 1942, reversing and remanding said cause to the Commission for further action by the Commission in accordance with said judgment.

OPINIONS BELOW

The opinions in the United States Court of Appeals for the District of Columbia (R. 183–213) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1942 (R. 215). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Respondent is licensed to operate Station KOA at Denver, Colorado, on the frequency 850 kilocycles; Station WHDH, at Boston, Massachusetts, was licensed on the same frequency for daytime operation. After a public hearing the Commission granted an application by WHDH for a construction permit to authorize the installation of equipment leading to a modification of the WHDH license to permit operation with increased power and without limitation of time. While the WHDH application was under consideration, KOA filed two petitions to intervene, and after the WHDH application was granted, filed a petition for rehearing on the ground that operation of WHDH as proposed would result in interference with the reception of KOA and therefore a substantial "modification of respondent's station license would result." Each of these petitions was denied by the Commission. KOA was, however, permitted to participate as *amicus curiae* in the proceedings before the Commission and was permitted to file exceptions to the Commission's proposed decision granting the application and to

file briefs and argue orally before the proposed decision was made final.

The questions presented are:[1]

1. Did the granting of the WHDH application constitute a substantial modification of the license of KOA or otherwise affect KOA's rights as a licensee so as to require under the Communications Act that KOA be permitted to intervene in the proceedings on the WHDH application before the Commission could lawfully grant that application?

2. If so, was KOA denied any substantial right of participation in the proceedings on the WHDH application?

STATUTE INVOLVED

The pertinent sections of Title III of the Communications Act of 1934, c. 652, 48 Stat. 1064 (hereafter referred to as the "Communications Act") are printed in the Appendix, infra, pp. 17–18.

STATEMENT

KOA commenced these proceedings by filing on June 7, 1941, in the court below, a "Notice of Appeal and Statement of Reasons Therefor," as provided by Section 402 (b) 2 of the Communications Act. KOA is the licensee of Station KOA,

[1] The only ground taken in any of the opinions below concluding that the Commission's decision was invalid, is that respondent had been improperly denied the right to intervene.

Denver, Colorado, which operates on the frequency 850 kilocycles, unlimited time, with power of 50 kilowatts. WHDH, prior to October 25, 1938, operated in Boston, Massachusetts, on the same frequency as KOA [2] with power of 1 kilowatt until sunset at Denver, Colorado (R. 1-2). Under the Commission's Rules (Sections 3.22 and 3.25) [3] the frequency on which KOA and WHDH operated was classified as I-A channel—one on which only one station is permitted to operate night time.[4]

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[2] Before March 29, 1941, both KOA and WHDH operated on the frequency 830 kilocycles. On that date they were shifted to 850 kilocycles in connection with a general shift of frequencies made in accordance with the provisions of the North American Regional Broadcasting Agreement. (R. 2.)

[3] The relevant portions of the Commission's Rules and Regulations are set out in the appendix, infra, pp. 19-24.

[4] Under the Commission's Rules and Regulations (Sec. 3.21), there are three classes of standard broadcast channels. The first type—the one involved in this case—is a clear channel on which stations render service over wide areas and which are cleared of objectionable interference within their primary service areas and over all or a substantial portion of the secondary service areas. The maximum power for such stations is 50 kilowatts. On some clear channels only one station is permitted to operate nighttime—the so-called I-A channels. On other clear channels—I-B—more than one station is permitted to operate nighttime.

The second type of channel is the regional channel on which several stations may operate with power not in excess of 5 kilowatts. The third type of channel is the local channel on which many stations may operate with power not in excess of 250 watts.

On October 25, 1938, Station WHDH filed an application with the Commission requesting an increase in power from 1 kilowatt to 5 kilowatts and authority to operate unlimited time. The application was designated for hearing (R. 4).

KOA filed a petition to intervene on September 23, 1939 (R. 13). That petition, omitting the formal allegations, reads as follows:

> 1. Petitioner operates station KOA at Denver, Colorado, on 830 kc with power of 50 kw unlimited time.
>
> 2. The operation of station WHDH at Boston, Mass., as proposed will cause interference to station KOA in areas where KOA's signal is now interference free.
>
> 3. Petitioner would be aggrieved and its interests adversely affected should WHDH be authorized to operate as proposed.
>
> 4. The operation of WHDH as proposed would not be in the public interest, convenience and necessity.

This petition was denied by the Motions Commissioner on the ground that it did not comply with Rule 1.102 on intervention.[5] The Commis-

[5] Rule 1.102 governing intervention provides: "Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, *the facts on which the petitioner bases his claim that his intervention will be in the public interest*, and must be subscribed or verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or

sioner rested his decision on grounds stated in a written opinion entered the same day, *In re Application of Hazelwood*, 7 F. C. C. 443 (1939) (R. 13–20). The action of the Motions Commissioner was affirmed by the Commission en banc on October 10, 1939, when it dismissed KOA's petition for review filed on October 4, 1939 (R. 24).

On December 9, 1940, the Commission (with two Commissioners dissenting) issued its Proposed Findings of Fact and Conclusions proposing to grant the WHDH application (R. 27–46). The Commission found that operation of Station WHDH as proposed would not cause interference to the primary service of any station and any interference which might be expected to KOA would be limited "to interference with intermittent reception upon receivers located in the eastern part of the United States, remote from the Station." The Commission concluded that the grant of the application would be in the public interest and that section 3.25 of the Rules should be amended so as to change the frequency 850 kilocycles from a I–A frequency to a I–B frequency—that is, a frequency upon which duplicate nighttime operation is permissible (R. 32).

On December 16, 1940, KOA filed a second petition to intervene (R. 46–49). In this petition

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equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same." [Italics supplied.]

KOA alleged that "the majority findings herein, if adopted by the Commission, will: (a) Result in interference to Station KOA in areas where KOA's signals are now interference free." The petition did not dispute the accuracy of the evidence offered at the hearing or the Commission's Findings and Conclusion that the operation of WHDH nighttime would not cause objectionable interference in KOA's area of effective service in the western part of the United States. This petition to intervene was denied by the Commission on January 7, 1941 (R. 50), but KOA was permitted to file a brief and participate in the oral argument as *amicus curiae* (*ibid.*). KOA also had an opportunity to present any testimony it desired at the hearing under Commission's Rule 1.195, *infra*, p. 19.

On March 26, 1941, the Commission (with two Commissioners dissenting) entered its Final Order adopting the proposed findings and amending the Rules and Regulations by transferring the frequency 850 kilocycles from subsection (a) of section 3.25 to subsection (b) of section 3.25 (R. 50–51).

On April 25, 1941, KOA filed a petition for rehearing (R. 52–63), which was denied on May 20, 1941 (R. 63–85).

The cause came on for argument before the court below on January 6, 1942. The court which heard this argument was composed of Chief Jus-

tice Groner and Justices Miller and Edgerton. On June 13, 1942, the court on its own motion set the cause for reargument before all six judges of that court. On September 12, 1942, the court handed down five opinions.

Justice Rutledge in his opinion concluded "For the error in excluding appellant from participation as a party in the final and controversial stage of the proceeding, contrary to the requirement of Section 303 (f) of the Act, the order must be reversed, with directions to afford appellant opportunity for hearing in accordance with the provisions of that section" (R. 206). Justice Rutledge took the position that the proceedings to and including the issuance of a proposed decision need not be reopened and that KOA should be permitted only a limited participation in proceedings beyond that point.[9] Chief Justice Groner and Justice Vinson in their joint opinion (R. 206–207) stated their agreement with Justice Rutledge only

[9] In fact the participation permitted respondent as *amicus curiae* might well be all that Justice Rutledge held respondent entitled to, provided the participation was under a label indicating that respondent was participating as of right rather than as of grace. In his opinion he states (R. 205): "Appellant has shown sufficiently its right to come in. It should have been allowed to do so, as a party to the proceeding, not merely as a friend of the Commission or a member of the public. That is true, notwithstanding the extent of participation actually allowed may have been substantially all that the party was entitled to have, though by this statement it is not intimated that this was true. That question need not be determined."

to the extent that "the case should be reversed and remanded for further hearing." They disagreed with Justice Rutledge, however, as to the nature and extent of the further hearing which should be held. They expressed the view that the proceedings before the Commission should be completely reopened and KOA be permitted to participate from the beginning. Justice Stephens in a separate opinion concurred in the views expressed by Chief Justice Groner and Justice Vinson as to the extent to which KOA was entitled to participate in the further proceedings required by the court's judgment and the nature of the further proceedings before the Commision.

Justice Miller filed a separate opinion (R. 209–210) dissenting from the conclusion of reversal and expressing the view that the appeal should be dismissed because respondent failed to allege any injury of a kind or character to constitute it an aggrieved or affected person within the meaning of Section 402 (b) (2) of the Communications Act. Justice Edgerton also filed a separate opinion (R. 211–213) dissenting from the conclusion of reversal. He expressed the view that KOA had not alleged any substantial injury and therefore was not "a person aggrieved or whose interests are adversely affected" so as to give it a standing to appeal under Section 402 (b) (2); in addition, he stated that even if KOA were such a person it had not been denied anything to which it was entitled.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to dismiss the appeal.

2. In holding that respondent had a right to intervene in the proceedings before the Commission on the WHDH application, and that the denial thereof gave it standing to appeal or furnished a basis for reversing the Commission's action.

3. In holding that respondent was in fact denied a substantial right of participation in the proceedings.

4. In failing to affirm the Commission's order.

REASONS FOR GRANTING THE WRIT

1. The uncertainty resulting from the diverse views in the opinions below calls, we submit, for the exercise of this Court's power of review. Not only is it difficult to determine what is required of the Commission on the remand in the present case, but the Commission cannot with assurance follow an intervention procedure which will command the approval of a majority of the members of the court below.

Three members of the court (Groner, C. J., Vinson, and Stephens, JJ.) have taken the position that the first petition to intervene, filed by KOA prior to any hearing on the application of WHDH, should have been granted by the Commission and that the denial of this petition constituted a basis for setting aside the Commission's

order granting the application. Justice Rutledge stated that the Commission properly denied this petition for intervention. Justice Edgerton expressed the view that the Commission had not improperly denied respondent any right of hearing to which it was entitled. Justice Miller, while not discussing any phase of the case except KOA's standing to appeal, would not have reached the conclusion he did had he considered the Commission's denial of KOA's petition for intervention a basis for setting aside the Commission's order. It is clear from the opinions of Chief Justice Groner and Justices Vinson and Stephens that compliance by the Commission with the views expressed by Justice Rutledge would not be a sufficient compliance with the Communications Act. Likewise, there is no doubt that compliance by the Commission with the views expressed by Chief Justice Groner and Justices Stephens and Vinson would be giving KOA more and WHDH less than each was entitled to have in the views taken by the other three members of the court.

Since the court below is the exclusive forum for appeals from many classes of Commission orders, review by this Court is important to resolve the divergences in the opinions below, not alone for the sake of this case, but more generally in the interest of certainty and uniformity of decision. Inasmuch as the court below normally sits as a court of three judges, the likelihood is present of

differences in result turning on the composition of the court. Compare the grant of certiorari in *Landis* v. *North American Company*, 299 U. S. 248, and in *John Hancock Insurance Company* v. *Bartels*, 308 U. S. 180, to resolve, respectively, diverse views leading to an ambiguous decree, and diverse views by divisions of the court.

2. The questions presented are important in the construction and administration of the Communications Act.

Section 312 (b) of the Act was the principal reliance of Chief Justice Groner and Justices Vinson and Stephens. That section provides that the Commission may issue an order modifying an outstanding license of a radio station provided the licensee of such station is given an opportunity to show cause why a proposed order modifying his license should not be adopted by the Commission before such order is made final. The Commission has maintained, as seems clear from the language of the section itself, that it has no application except where an order specifically modifying an outstanding license is issued by the Commission on its own motion, and in such circumstances it applies only to the licensee whose license has been so modified by the order. Nevertheless, the three members of the court below have construed Section 312 (b) to make it applicable to: (a) orders entered by the Commission under the provisions of Section 309 (a) of the Act granting applica-

tions for license or modification of license; (b) rules and regulations promulgated under Section 303 of the Act which may require modification in the operation of radio stations under outstanding licenses; and (c) a licensee (not required to modify in any manner its operation under its license) if operation of another station is by any order, rule, or regulation of the Commission changed so that interference may result to reception of such licensee's station. Thus Section 312 (b) is made applicable to orders, rules, and regulations that not only are not intended to be subject to it but are specifically covered by other provisions of the Act which prescribe different procedures; it is also made applicable in cases where no modification of license within the meaning of that section is made at all. Under this interpretation the procedure specifically prescribed by the statute for handling applications and for adopting rules and regulations cannot be followed. Moreover, this interpretation creates in licensees of radio broadcast stations a substantial right in derogation of the public interest, the existence of which is inconsistent with the declared purpose of the Act.

Justice Rutledge relied on Section 303 (f) of the Act. That section deals with the Commission's power to make regulations to prevent interference and for other purposes, and contains a proviso "that changes in the frequencies, authorized power, or in the times of operation of any station, shall

not be made without the consent of the station licensee" except after public hearing. Justice Rutledge construed this proviso as applicable not only to the licensee of the station whose power, frequency, or time of operation is changed by a regulation, but as requiring consent of the licensee of any station which, although neither its frequency, authorized power, nor time of operation is affected by the regulation, may receive interference from the station whose power, frequency, or time of operation is changed by the regulation. It seems quite plain, and the Commission has always so construed the Act, that Congress did not intend to restrict the Commission's rule-making power by requiring it, before adopting regulations, to obtain consent of, or hold public hearing at which, all licensees, however indirectly affected, would be entitled to participate as parties. Congress intended only to limit the exercise of the Commission's rule-making power where the effect of the rule is to require a station licensee to change its frequency, power, or hours of operation, to the extent of requiring such licensee's consent or a public hearing. Although the Commission has usually held public hearings before any important or far-reaching changes in its regulations governing operation of stations are made, it has never assumed that licensees whose power, frequency, or hours of operation would not be affected by the

change in regulations should be entitled to participate as parties, to examine and cross-examine witnesses, and exercise such other rights as parties should be given.

The extension of the provisions of 303 (f) and 312 (b) either as Chief Justice Groner and Justices Vinson and Stephens or as Justice Rutledge interpret them would require changes in the Commission procedures for the adoption of almost all regulations promulgated under Title III of the Communications Act and for dealing with all applications for radio facilities and renewals thereof. The Commission's rule on intervention, adopted in 1939, is the result of experience under a prior rule which had permitted intervention to any party disclosing "a substantial interest in the subject matter." The abuses which arose under that practice led to the adoption of the present rule.[7] That doubt should be cast on the propriety of the Commission's procedure in the case at bar is particularly unjustified, it is submitted, in view of the substantial participation which respondent was in fact afforded both through permission to file briefs and make oral arguments excepting to the proposed findings and conclusions of the Commission, and through the opportunity under Rule 1.195 to present testimony at the hearing.

[7] See Attorney General's Committee on Administrative Procedure, Monograph No. 3, pp. 16–17.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

DECEMBER 12, 1942.

APPENDIX

Communications Act of 1934:

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

* * * * *

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time

and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

* * * * * *

SEC. 312. (b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

* * * * * *

SEC. 402. (b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

Rules and Regulations of Federal Communications Commission:

SEC. 1.102. *Intervention.*—Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest, and must be subscribed or verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same.

SEC. 1.195. *Communications relating to applications.*—There will be maintained in the office of the secretary of the Commission a record of all communications received by the Commission relating to the merits of any application pending before the Commission requesting the granting, renewal, modification, or revocation of any license or construction permit, certificate of convenience and necessity, or rate schedule. Such record shall show the name and address of the person making the statement and the substance of such statement. When the date of hearing has been set, if the matter is designated for hearing, the secretary shall notify all persons shown by the records to have communicated with the Commission regarding the merits of such matter in order that such persons will have an

opportunity to appear and give evidence at such hearing: *Provided,* That in the case of communications bearing more than one signature, notice shall be given to the person first signing unless the communication clearly indicates that such notice should be sent to some one other than such person.

No such person shall be precluded from giving any relevant material and competent testimony at such hearing because he lacks a sufficient interest to justify his intervention as a party in the matter.

No such communication will be considered by the Commission in determining the merits of any such matter nor shall any such communication be considered by any examiner unless it has been introduced into evidence at the hearing and appears as a part of the record. The admissibility of any such communication or the secretary's record of any such communication shall be governed by the applicable rules of evidence, and no such communication shall be admissible on the basis of a stipulation unless Commission's counsel as well as counsel for all of the parties shall join in such stipulation.

Such communications, however, may be considered by the Commission if circumstances warrant in deciding whether or not a matter shall be set down for hearing in cases where in the absence of such communication no hearing would be required by the Commission.

SEC. 3.21. *Three classes of standard broadcast channels.*—(a) *Clear channel.*—A "clear channel" is one on which the dominant station or stations render service over wide areas and which are cleared of

objectionable interference within their primary service areas and over all or a substantial portion of their secondary service areas.

(b) *Regional channel.*—A "regional channel" is one on which several stations may operate with powers not in excess of 5 kilowatts. The primary service area of a station operating on any such channel may be limited, as a consequence of interference, to a given field intensity contour.

(c) *Local channel.*—A "local channel" is one on which several stations may operate with powers not in excess of 250 watts. The primary service area of a station operating on any such channel may be limited, as a consequence of interference, to a given field intensity contour.

SEC. 3.22. *Classes and power of standard broadcast stations.*—(a) *Class I station.*—A "class I station" is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in accordance with the channel designation in section 3.25 or in accordance with the "Engineering Standards of Allocation." The operating power shall be not less than 10 kilowatts nor more than 50 kilowatts. (Also see section 3.25 (a) for further power limitation.)

(b) *Class II station.*—A "class II station" is a secondary station which operates

on a clear channel (see section 3.25) and is designed to render service over a primary service area which is limited by and subject to such interference as may be received from class I stations. A station of this class shall operate with power not less than 0.25 kilowatts nor more than 50 kilowatts. Whenever necessary, a class II station shall use a directional antenna or other means to avoid interference with class I stations and with other class II stations, in accordance with the Engineering Standards of Allocation.

(c) *Class III station.*—A "class III station" is a station which operates on a regional channel and is designed to render service primarily to a metropolitan district and the rural area contiguous thereto. Class III stations are subdivided into two classes:

(1) *Class III–A station.*—A "class III–A station" is a class III station which operates with power not less than 1 kilowatt nor more than 5 kilowatts, and the service area of which is subject to interference in accordance with the Engineering Standards of Allocation.

(2) *Class III–B station.*—A "class III–B station" is a class III station which operates with a power not less than 0.5 kilowatt nor more than 1 kilowatt night and 5 kilowatts daytime, and the service area of which is subject to interference in accordance with the Engineering Standards of Allocation.

(d) *Class IV station.*—A "class IV station" is a station operating on a local channel and designed to render service primarily to a city or town and the suburban and rural

areas contiguous thereto. The power of a station of this class shall not be less than 0.1 kilowatt nor more than 0.25 kilowatt, and its service area is subject to interference in accordance with the Engineering Standards of Allocation.

SEC. 3.25 *Clear channels: Class I and II stations.*—The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations are given:

(a) To each of the channels below there will be assigned one class I station and there may be assigned one or more class II stations operating limited time or daytime only: * * * The power of the class I stations on these channels shall not be less than 50 kilowatts.

(b) To each of the channels below there may be assigned class I and class II stations: * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 585

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NATIONAL BROADCASTING COMPANY, INC. (KOA)

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

OPINION BELOW

The opinions in the United States Court of Appeals for the District of Columbia (R. 183–213) have not yet been reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on September 12, 1942 (R. 215). The petition for a writ of certiorari was filed on December 12, 1942, and was granted on January 18, 1943. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Respondent is licensed to operate Station KOA at Denver, Colorado, on the frequency 850 kilocycles; Station WHDH, at Boston, Massachusetts, was licensed on the same frequency for daytime operation. After a public hearing the Commission granted an application of WHDH for a construction permit to authorize the installation of equipment leading to a modification of the WHDH license to permit operation with increased power and without limitation of time. While the WHDH application was under consideration, KOA filed two petitions to intervene, on the ground that operation of WHDH as proposed would result in interference with the reception of KOA and therefore a "substantial modification" of respondent's station license would result. Each of these petitions was denied by the Commission. KOA was, however, permitted to participate as *amicus curiae* in the proceedings before the Commission and to file briefs and argue orally before the proposed decision was made final, and to file a petition for rehearing.

The questions presented are:[1]

1. Did the granting of the WHDH application constitute a substantial modification of the license of KOA or otherwise affect KOA's rights as a licensee so as to require under the Communica-

[1] The only ground taken in any of the opinions below concluding that the Commission's decision was invalid, is that respondent had been improperly denied the right to intervene.

tions Act that KOA be permitted to intervene in the proceedings on the WHDH application before the Commission could lawfully grant that application?

2. If so, was KOA denied any substantial right of participation in the proceedings on the WHDH application?

STATUTE INVOLVED

The pertinent sections of Title III of the Communications Act of 1934, c. 652, 48 Stat. 1064 (hereinafter referred to as the "Communications Act") are printed in the Appendix, *infra*, pp. 56–63. The pertinent Regulations are printed at pp. 63–67.

STATEMENT

National Broadcasting Company, Inc., licensee of Station KOA, Denver, Colorado (hereinafter referred to as "KOA"), commenced this action by filing on June 7, 1941, in the court below, a "Notice of Appeal and Statement of Reasons Therefor", as provided for by Section 402 (b) 2 of the Communications Act. The action was directed against an order of the Federal Communications Commission (hereinafter referred to as "Commission"), granting an application of Matheson Radio Company, Inc., Boston, Massachusetts, (hereinafter referred to as "WHDH"), for increased power and increased hours of operation. The court below reversed the Commission, and upon petition of the Commission this Court granted certiorari.

KOA is a radio broadcasting station which operates on the frequency 850 kilocycles, unlimited time, with power of 50 kilowatts. WHDH, prior to October 25, 1938, operated in Boston, Massachusetts, on the same frequency as KOA,[2] with power of 1 kilowatt until sunset at Denver, Colorado (R. 1–2). Under the Commission's Rules (Sections 3.22 and 3.25)[3] the frequency on which KOA and WHDH operated was classified as I-A channel—one on which only one station is permitted to operate nighttime.[4]

On October 25, 1938, WHDH filed an application with the Commission requesting an increase in power from 1 kilowatt to 5 kilowatts and authority to operate unlimited time (R. 97–104).

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[2] Before March 29, 1941, both KOA and WHDH operated on the frequency 830 kilocycles. On that date they were shifted to 850 kilocycles in connection with a general shift of frequencies made in accordance with the provisions of the North American Regional Broadcasting Agreement (R. 64, n, 1).

[3] The relevant portions of the Commission's Rules and Regulations are set out in the appendix, *infra*, pp. 63–67.

[4] Under the Commission's Rules and Regulations (Sec. 3.21), there are three classes of standard broadcast channels. The first type—the one involved in this case—is a clear channel on which stations render service over wide areas. The maximum power for such stations is 50 kilowatts. On some clear channels only one station is permitted to operate nighttime—the so-called I-A channels. On other clear channels—I-B—more than one station is permitted to operate nighttime.

The second type of channel is the regional channel on which several stations may operate with power not in excess of 5 kilowatts. The third type of channel is the local channel on which many stations may operate with power not in excess of 250 watts.

Upon examination of the WHDH application, the Commission was unable to find that public interest, convenience, or necessity would be served by granting it; and consequently designated the application for hearing. On September 2, 1939, the Commission designated the following issues for the hearing (R. 11–12):

> 1. To determine whether the interests of any other stations may be adversely affected by reason of interference, particularly stations KOA, WRUF, WEEU, and WABC;
>
> 2. [An issue relating to an application from a Florida station which was subsequently withdrawn and is not material here.]
>
> 3. To determine whether public interest, convenience or necessity would be served by modifying the Rules governing standard broadcast stations, particularly Sections 3.22 and 3.25 (Part 3), to authorize the operation of WHDH as proposed;
>
> 4. To determine whether station WHDH, operating as proposed on 830 kc, with 5 kw power would render the type of service for which said frequency is designed under the Commission's plan of allocation and Standards of Good Engineering Practice.

On September 23, 1939, KOA filed a petition to intervene in the proceedings before the Commission (R. 13). That petition, omitting the formal allegation, reads as follows:

> 1. Petitioner operates station KOA at Denver, Colorado, on 830 kc with power of 50 kw. unlimited time.

2. The operation of station WHDH at Boston, Mass., as proposed will cause interference to station KOA in areas where KOA's signal is now interference free.

3. Petitioner would be aggrieved and its interests adversely affected should WHDH be authorized to operate as proposed.

4. The operation of WHDH as proposed would not be in the public interest, convenience, and necessity.

The petition was denied by the Motions Commissioner on the ground that it did not comply with the Commission's rule on intervention[5] (R. 13). The Commissioner rested his decision on grounds stated in a written opinion entered the same day, *In re Application of Hazelwood,* 7 F. C. C. 443 (1939) (R. 14–20). The action of the Motions Commissioner was affirmed by the Commission *en banc* on October 10, 1939, when it dismissed KOA's petition for review filed on October 4, 1939 (R. 24).

On December 2, 1939, the Commission issued a second Notice of Hearing to replace that issued on September 2, 1939, containing the following issues (R. 25–26):

1. To determine whether or not the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III) properly interpreted and

[5] Rule 1.102 governing intervention is set forth *infra*, p. 63.

applied preclude the granting of the application;

2. To determine the nature, extent and effect of any interference which would result should the applicant's proposed station operate simultaneously with stations KOA, WRUF, WEEU, and WABC;

3. [An issue relating to the Florida application not material here].

On January 29 and 30, 1940, a hearing was held before an Examiner of the Commission in which the applicant and station WEEU, which had been permitted to intervene, participated (R. 28). WEEU operates at Reading, Pennsylvania, on the same frequency as the applicant. Testimony was given by witnesses for the applicant and by a member of the Commission's engineering staff.

On December 9, 1940, the Commission (with two Commissioners dissenting) issued its Proposed Findings of Fact and Conclusions proposing to grant the WHDH application (R. 27–46). The Commission found that operation of Station WHDH as proposed would not cause interference to the primary service of any station, and any interference which might be expected to KOA would be limited "to interference with intermittent reception upon receivers located in the eastern part of the United States, remote from the station" (R. 32). The Commission concluded that the

grant of the application would be in the public interest and that Section 3.25 of the Rules should be amended so as to change the frequency 850 kilocycles from a I–A frequency to a I–B frequency—that is, a frequency upon which duplicate nighttime operation is permissible (R. 31–32).

On December 16, 1940, KOA filed a second petition to intervene (R. 46–49). In this petition KOA alleged *inter alia* that the majority findings, if adopted by the Commission, would:

> (a) Result in interference to Station KOA in areas where KOA's signals are now interference free.
>
> (b) Result in a modification of Petitioner's license * * * contrary to Section 312 (b) of the Communications Act of 1934.
>
> (c) Result in a modification of the Commission's Regulations * * * contrary to Section 303 (f) of the Communications Act.

The petition did not dispute the accuracy of the evidence offered at the hearing or of the Commission's Findings and Conclusions that the operation of WHDH nighttime would not cause objectionable interference in the effective service area of KOA in the western part of the United States; nor did it show any intention on the part of KOA to offer any evidence material to a determination of the WHDH application which had not already been considered by the Commission. This petition to intervene was denied by the Com-

mission on January 7, 1941 (R. 50). KOA was, however, permitted to file a brief and participate as *amicus curiae* in the oral argument before the Commission (R. 50, 69).

At any stage of the proceeding, despite the fact that it had not been permitted to intervene because of failure to meet the requirements of the Commission's Rule on intervention, KOA could have taken advantage of the provisions of Commission's Rule 1.195[4] in order to bring any facts before the Commission which it thought relevant to proper determination of the questions raised by the WHDH application. KOA did not attempt to take advantage of the provisions of that section of the Commission's Rules.

On March 26, 1941, the Commission (with two Commissioners dissenting) entered its Final Order adopting the proposed findings and amending the Rules and Regulations by transferring the frequency 850 kilocycles from subsection (a) of Section 3.25 to subsection (b) of Section 3.25 (R. 50–52).

On April 25, 1941, KOA filed a petition for rehearing (R. 52–63) going to the merits of the order; the petition was fully considered by the

[4] "§ 1.195. Communications relating to applications.— * * * No such person shall be precluded from giving any relevant material and competent testimony at such hearing because he lacks a sufficient interest to justify his intervention as a party in the matter. * * *." The rule is set forth in full, *infra*, p. 64.

Commission, and a further comprehensive opinion was rendered discussing KOA's objections *seriatim*. The order was reaffirmed and the petition for rehearing denied on May 20, 1941 (R. 63–85). On June 7, 1941, KOA filed in the court below a Notice of Appeal and Statement of Reasons Therefor (R. 1–10).

The cause was argued before the court below on January 6, 1942. The court which heard this argument was composed of Chief Justice Groner and Justices Miller and Edgerton. On June 13, 1942, the court on its own motion set the cause for reargument before all six judges of that court. On September 12, 1942, the court handed down five opinions and entered judgment reversing and remanding the cause for further proceedings in conformity with the "opinion of this Court." The basis of the action of the court below was the failure of the Commission to permit KOA to participate as a party to the proceedings before it.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In failing to dismiss the appeal.

2. In holding that respondent had a right to intervene in the proceedings before the Commission on the WHDH application, and that the denial thereof gave it standing to appeal or furnished a basis for reversing the Commission's action.

3. In holding that respondent was in fact denied a substantial right of participation in the proceedings.

4. In failing to affirm the Commission's order.

SUMMARY OF ARGUMENT

I

Respondent had no right to intervene as a party in the proceedings on the application of station WHDH. The Communications Act contains no provisions with respect to intervention but provides that the Commission shall "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Section 4 (j). The Commission's rule on intervention requires that the petition must set forth the grounds of the proposed intervention, the interest of the petitioner, and the facts on which the intervention is claimed to be in the public interest. This provision is a reasonable one. Under the older practice, whereby intervention was granted to persons having some interest in the proceedings, parties became numerous, hearings protracted, and records voluminous. The interest of the public in having new facilities licensed was thwarted. The variety and number of interests which in some manner may be affected by the grant of applications make it appropriate that intervention be limited to instances where the Commission will be aided in applying the statutory standards. In fact, under the present rule petitions for inter-

vention have been granted in more than half the cases where they were filed, and only about one-fifth have been denied outright.

Respondent's petitions failed to comply with the Commission's rule, taking the position that it was entitled to intervene as a matter of right. It did not, moreover, seek to introduce evidence, as one not a party by intervention may do under the Commission's rules.

Provisions of the statute relied on by respondent do not support its position. Section 303 (f) requires a hearing to be afforded a station licensee before a regulation is adopted which changes the frequency, authorized power, or times of operation of its station. The order granting the WHDH application makes no change whatever with respect to the operation of respondent. Similarly, Section 312 (b) requires an opportunity to show cause before an order of revocation or modification of a station license is made final. No such action with respect to the respondent is involved here. Its license is not modified; a license is carefully restricted in scope by Sections 304 and 309 (b) (1) of the statute, and simply gives the licensee authority to operate on the terms prescribed. The license does not confer any right to claim a given area as one in which the licensee's signals must be kept free of interference.

No constitutional considerations require that respondent be permitted to intervene. The action

of the Commission does not interfere with any of respondent's legal rights. Apart from statute there is no right to be free of increased competition and no right to be made a party before such competition is authorized. At best respondent's position is essentially no different from that of a newspaper or advertising agency whose revenues may be affected by the grant or extension of a license to an applicant.

II

The participation of respondent was in fact adequate and appropriate to its interest. It was permitted to file a brief and make oral argument after the entry of proposed findings and conclusions of the Commission; and its petition for rehearing after these were made final was fully considered by the Commission. The issues involved in the proceedings were essentially one of judgment with respect to the application of a rule of the Commission regarding exclusive nighttime operation, in the circumstances here disclosed, and one of expert engineering advice regarding the existence and extent of interference which might result. On the issue of administrative judgment, respondent's presentation of its views through brief and oral argument and petition for a rehearing was adequate and appropriate. On the issue of engineering advice, the Commission was entitled to rely primarily on the evidence of

its expert. Moreover, the findings show that the interest of respondent is remote, since the operation of WHDH as proposed will not interfere with respondent's area of satisfactory service, but will be limited to interference with intermittent reception in the eastern part of the United States remote from respondent's station. Respondent did not attack the accuracy of these findings.

III

The interest of respondent is too remote to give it standing to appeal under Section 402 (b) (2). Unless a more concrete showing of financial detriment is required, respondent's standing to appeal would raise serious constitutional difficulties for want of a case or controversy.

If the Court should nevertheless regard respondent's interest as adequate under the decision in the *Sanders Brothers* case, 309 U. S. 470, we suggest that the meaning of Section 402 (b) (2) be examined in the light of recent decisions of this Court. It is believed that, when so examined, the section will be found to authorize appeal only by those whose legal interests are sought to be vindicated. Such interests might be possessed, for example, by persons having contractual relations which are invaded by an order of the Commission granting a license to an applicant. Cf. *Columbia Broadcasting System* v. *United States*, 316 U. S. 407. Furthermore, the history of the section

indicates that its real purpose was to allocate review of the Commission's orders between district courts and the Court of Appeals, and not to confer additional legal protection to persons who would lack standing to bring suit under the Urgent Deficiencies Act. The construction we suggest avoids the incongruity of making an appealable interest turn on whether the suit arises out of proceedings begun before the Commission by an applicant or licensee on the one hand, or by the Commission on its own motion on the other; it is this distinction which determines whether review is to be had under the Urgent Deficiencies Act or in the Court of Appeals under Section 402 (b) (2).

ARGUMENT

I

RESPONDENT HAD NO RIGHT TO INTERVENE ON THE WHDH APPLICATION

1. THE CONTROLLING STATUTORY PROVISIONS AND THE COMMISSION'S REGULATIONS

Respondent filed two petitions to intervene in the hearing on the WHDH application. The first was filed September 23, 1939, before the hearing was held, and the second was filed December 16, 1940, after the conclusion of the hearing and after the Commission had issued its Proposed Findings of Fact and Conclusions (R. 13, 46). Both petitions were denied by the Commission because they

were not in compliance with its rule on intervention (R. 13, 50).

The Communications Act contains no mandatory provision with respect to intervention in hearings. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138. The determination whether to permit or to deny intervention is committed to the Commission's discretion by Section 4 (j), which provides that the Commission shall "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." In pursuance of this provision the Commission has adopted Rule 1.102, relating to intervention by interested parties. Rule 1.102 reads as follows:

> § 1.102. *Intervention.*—Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest, and must be subscribed or verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those

> specified in the Commission's notice of hearing unless on motion the Commission shall amend the same.

The reasonableness of this provision should be considered in the light of the provisions of the Communications Act relating to the duty of the Commission to hold hearings, the nature of radio broadcasting, and the Commission's experience under its old procedure, wherein intervention was virtually automatic.

Section 309 (a) of the Communications Act provides:

> If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

This section was formerly Section 11 of the Radio Act of 1927, and was brought over verbatim into the Communications Act. The House Managers in charge of H. R. 9971, 69th Cong.,

which became the Radio Act of 1927, explained the purpose of Section 11 as follows:[7]

> Section 11 authorizes the licensing authority * * * *to issue licenses upon examination of the application* if it determines that public interest, convenience, or necessity would be served by the granting thereof. It provides, however, that in the event the licensing authority upon examination of an application does *not* reach such decision with respect thereto, it shall *then* notify the applicant and fix and give notice of the time and place of hearing on the application. [Italics supplied.]

Thus, Section 309 (a) not only does not prohibit the Commission from granting applications without a hearing, but taken together with Section 307 (a) makes it mandatory for the Commission to do so if it can determine from the application that public interest, convenience, or necessity would be served by a grant thereof. Thereby Congress sought to promote the full utilization of radio facilities in the public interest by having them assigned as promptly as possible while at the same time affording to *applicants* the maximum protection against unwarranted *denials* of licenses to operate radio equipment by requiring that notice and opportunity to be heard be given to the applicant before its

[7] 68 Cong. Rec. 2563. The statement of the Senate Managers on Section 11 is identical with that of the House Managers. See 68 Cong. Rec. 2589.

application may be denied. No such right of notice and hearing is conferred in any event upon any person other than the applicant.

Under the older procedure the Commission permitted any person to intervene if his petition disclosed an interest in the subject matter. This system, however, proved impracticable, as pointed out by the Commission in its decision in *In re Application of Hazelwood, Inc.* (Docket 5698 (R. 14–20)):

> Under its former rule, the Commission permitted any person to intervene in a hearing if his petition disclosed "a substantial interest in the subject matter." This standard was so broad and the Commission's practice under it was so loose that intervention in Commission hearings came to be almost a matter lying in the exclusive discretion of persons seeking to become parties to Commission proceedings. The experience of the Commission during the past few years clearly demonstrated that the participation of parties other than the applicant in broadcast proceedings in a great many cases resulted in unnecessarily long delays and expense to both the Commission and applicants without any compensating public benefit. In many cases the major function served by intervenors was to impede the progress of the hearing, increase the size of the record, confuse the issues and pile up costs to the applicant and to the Commission through the intro-

duction of cumulative evidence, unnecessary cross-examination, dilatory motions, requests for oral argument and other devices designed to prevent expeditious disposal of Commission business (R. 16).

The Commission found that intervention under the old rule became virtually a matter of discretion with proposed intervenors, with the result that parties became numerous, hearings protracted, and records voluminous. Effective dispatch of the Commission's business was impossible, and the interest of the public and of applicants in having new facilities licensed was effectively thwarted.

It thus became apparent that interest alone was an insufficient test for intervention. Because of the nature of radio broadcasting, virtually every application for a new station or increased facilities involves many persons who claim to be interested. Such applications are commonly for facilities in a community which already has one or more stations which may be fearful of the competition which the operation of the proposed station might entail, or are for facilities which cause some degree of electrical interference to existing stations operating on the same or adjacent frequencies. In many situations both factors combine to increase the number of potentially interested persons. The situation is aggravated by the fact that in practically every instance the persons who claim interest in the proceedings are existing

licensees whose private interests are promoted by protracted proceedings which delay as long as possible the establishment of competing facilities.[8]

It was to remedy this situation that the present rule governing intervention, quoted above, was adopted. Under this rule the petition must show not only the interest of the proposed intervenor but also how his participation in the hearing will be of assistance to the Commission in determining the issues before it. This rule was not adopted, as respondent has suggested, for the convenience of the Commission but rather because the Com-

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[8] "* * * More often than not the intervenors presented no affirmative evidence on the issues at hand. The major functions served by them were apparently to impede the progress of the hearing, to increase the size of the record, and to obfuscate the issues by prolonged and confusing cross-examination. Nor were these dilatory and destructive tactics restricted to the hearing itself. Each intervener would customarily avail himself of his rights to take exceptions to the examiner's report, to oral argument before the Commission, and, in many cases, to appeal from the Commission's order to the District of Columbia Court of Appeals.*

"The deplorable consequences of the Commission's 'liberal' intervention policy became so apparent that the Commission recently came to grips with the problem."

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*"The purpose of the intervener's dilatory tactics was, in many cases, to frustrate the licensing and operation of a competing station for as long a period as possible. It was believed that the cost of maintaining proceedings before the Commission and the courts could easily be covered by the continued revenues from sponsors who might be lost if a competing station were in existence." *Administrative Procedure in Government Agencies*, Monograph No. 3, S. Doc. 186, 77th Cong., 3d sess., pp. 16–17.

mission's experience showed that the rights of applicants for new stations and the interest of the public in the maximum utilization of radio facilities were jeopardized by a procedure permitting unlimited intervention. Opportunities for delay and protracted proceedings, which the old procedure invited, made impossible an efficient administration of the Act and retarded the maximum utilization of radio facilities—primary objectives sought to be achieved by the Communications Act. Rule 1.102 has aided the Commission in attaining these objectives by permitting intervention only in those cases where it will be of assistance in determining the matters in issue.[9] This result has not been achieved at the expense of persons with a substantial interest in proceedings, for the Commission has been liberal in applying its intervention rule. Compliance is not difficult, as is evident from the high percentage of cases in which the Commission has permitted in-

[9] "In general, it may be said that denials and dismissals of petitions to intervene have been based upon the fact that the proposed intervener desired only to show at the hearing the manner in which his private interests would be affected by a grant of the application, and in many instances the proposed intervener did not indicate that he was prepared to show even this much. Such petitions have failed to address themselves to any consideration of public interest or to facts which would constitute valid grounds for denial of the application in which participation was sought by the objecting person." Hearings before Subcommittee of the Committee on the Judiciary, on S. 674, S. 675, and S. 918, 77th Cong., 1st sess., pp. 1558–1559 (Statement of the Commission).

tervention. As of June 1942, 217 petitions for intervention had been filed under the new rule; of these, 124 were granted, 37 dismissed without prejudice, 12 withdrawn, and 44 denied. See Hearings on H. R. 5497, 77th Congress, 2d Session, before House Committee on Interstate and Foreign Commerce, p. 782. Thus in more than half the cases the petitions were granted, and in ~~less than~~ only a fifth were they denied absolutely.

Respondent's petitions to intervene failed to comply with the requirements of the Commission's rule on intervention, and made no attempt to comply, contending that the Commission had no authority to make such requirements.[10] Its first petition to intervene, filed on September 23, 1939, contained but 11 or 12 lines, and omitting its formal provisions read as follows (R. 13):

> 1. Petitioner operates station KOA at Denver, Colorado on 830 kc with power of 50 kw unlimited time.
>
> 2. The operation of station WHDH at Boston, Mass., as proposed will cause interference to station KOA in areas where KOA's signal is now interference free.
>
> 3. Petitioner would be aggrieved and its interests adversely affected should WHDH be authorized to operate as proposed.
>
> 4. The operation of WHDH as proposed would not be in the public interest, convenience and necessity.

[10] See Petition for Review, R. 23.

No attempt was made in the petition to allege or show the extent of interference which would be caused to Station KOA as a result of the operation of WHDH on the same frequency, or how the intervention of KOA would in any way assist the Commission in the determination of the issues at the hearing. Petitioner predicated its case on its status as the licensee of a dominant station on a clear channel on which the applicant was requesting authority to operate unlimited time. Accordingly, the Commission, on September 29, 1939, denied the petition to intervene (R. 13).[11]

The same observation may be made with respect to respondent's second petition to intervene, filed December 16, 1940, after the Commission had issued its Proposed Findings of Fact and Conclusions. In this petition respondent alleged that it was the licensee of KOA at Denver, Colorado, a dominant clear-channel station, and that the Commission, by its Proposed Findings of Fact and Conclusions, had indicated that it would permit Station WHDH to operate unlimited time on that frequency. Respondent requested that it be permitted to intervene in order that, as a party, it could (R. 49):

> 1. Renew its Motion to Dismiss the WHDH application.

[11] The order denying the petition to intervene referred to the Commission's decision in a case decided the same day. *In re Application of Hazelwood, Inc.* (Docket No. 5698), quoted, *supra*, p. 19.

2. File a Motion to Reopen the proceeding in order to afford Petitioner an opportunity to introduce evidence to cross examine all witnesses and otherwise to participate fully in the proceedings.

3. Upon such record file proposed Findings of Fact and Conclusions of Law. .

4. Have the right to file Exceptions to any proposed Commission decision thereafter issued.

5. Request Oral Argument upon such proposed decision and upon its Exceptions thereto.

6. In all respects participate fully in the important issues involved in the application of Matheson Radio Company, Inc.

This petition, it should be noted, did not in any way suggest that any of the proposed findings of fact issued by the Commission were erroneous, and, like the first petition, did not even allege that respondent had any evidence to introduce; nor did it contain any showing as to what it intended to prove by participating in the hearing. Accordingly, the second petition was likewise denied, but respondent was given an opportunity to file a brief with the Commission and to appear before the Commission *en banc* and argue orally why the Commission's proposed decision should not be made final. Respondent availed itself of this opportunity.

It should also be remembered that respondent did not seek to present evidence, short of partici-

pation as a party through intervention, pursuant to the Commission's Rule 1.195, *infra*, p. 64. This rule must be considered in appraising the reasonableness of the rule on intervention.

We submit, in short, that under the controlling statutory provisions and under regulations of the Commission which are entirely reasonable and appropriate, the respondent's petitions for intervention were properly denied.

2. OTHER PROVISIONS OF THE STATUTE

The opinions below discuss, and respondent has placed reliance on, Sections 303 (f) and 312 (b) of the Act. It is our position that these provisions do not support the claim of KOA that it has a right to intervene, and that in fact the existence of such a right is negatived by these provisions and the scheme of the Act as a whole.

That such a right does not exist under the statute is shown by Section 309 (a), *infra*, p. 60, which prescribes the procedure which the Commission must follow in acting on an application for a license or renewal or modification. As pointed out, *supra*, p. 18, the Commission must grant the application forthwith if it is able to determine from an examination of the application that a grant of it will serve public interest, convenience, or necessity. If it cannot so determine, the Commission must notify the applicant and afford it an opportunity to be heard under rules and regulations prescribed by the Commission. The omission of any pro-

vision for the right of an interested person to be heard is significant, particularly in view of the statutory provisions about to be considered which make specific provision for hearings in well-defined classes of cases. Moreover, in giving an opportunity for "rehearing" in Section 405, the Act provides that application therefor may be made "by any party or any person aggrieved or whose interests are adversely affected thereby." If KOA's claim were based on its being a person of the character described, its right would not be one of intervention but at most a right to seek a "rehearing." For this purpose it is immaterial whether the application has been granted with or without a hearing. The concept of "rehearing" is broad enough, as the administrative practice recognizes, to enable a person not theretofore a party to a hearing to file a petition under Section 405. This was in fact the procedure followed in *Scripps Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, as the opinion in that case discloses.[12] A petition for rehearing is necessary to exhaust administrative remedies under the Act, with respect to persons not theretofore parties. *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. (2d) 282 (App. D. C.), certiorari denied, 305 U. S. 625.

[12] Other cases in the Court of Appeals in which such petitions for rehearing were filed and appeals subsequently taken are: *Palmer* v. *Federal Communications Commission*, No. 7542; *Brown Radio Service* v. *Federal Communications*

terms or to modify the operating requirements or conditions of the license. For example, if the Commission by order proposed to revoke the license of KOA or to require it to operate with 5 or 500 kilowatts instead of 50 kilowatts power, KOA would have a right to be heard or to show cause before the Commission could make its order final.

Since the operation of a station in a manner not in accordance with its license is a criminal offense under the statute (Sections 301, 501), Section 312 provides for an opportunity to show cause where the terms of the license are proposed to be modified. In the present case the order of the Commission granting WHDH the authority which it has requested with respect to its transmitter at Boston does not require KOA to make any change whatever in its operation. Continuation of its present operations will subject it to no penalty.

The argument of KOA is in substance that Congress intended by Section 312 (b) to provide for a hearing to a licensee before any order could be entered which either directly or indirectly might result in a curtailment of the area in which the signals of the station could be satisfactorily received. This argument misconceives the provisions of Section 312 (b). The right protected by that section is the right to operate under the terms of a license as granted, not a supposed right that a station shall have its signals received throughout a given service area during the term

of the license. It is significant that Section 303 (h), *infra*, p. 58, provides that the Commission shall have authority to establish areas or zones to be served by any station, but does not provide that any licensee shall have a right to be heard before the area or zone to be served by his station shall be established or defined by the Commission. In view of the fact that in Section 303 (f) the Commission's power to make regulations without affording hearings to affected licensees is specifically restricted if the regulation changes the power, frequency or times of operation of a station, it is hardly likely that Congress in Section 303 (h) would not have included a similar provision for hearing had its considered a licensee entitled as of right to have its signals received without interference throughout any given area or at any particular point.

The assumption by KOA that the Commission is effecting a modification of its license by the grant to WHDH rests on an untenable view of the license. The license authorizes KOA to operate a transmitter of 50 kilowatts on the frequency 850 kilocycles at Denver. Without the license it would be a criminal offense for KOA to operate this transmitter. There is nothing in the license which guarantees KOA against operation by others of electrical equipment for the purpose of transmitting radio signals or for some other purpose, though the result of such operation is to

interfere with reception of KOA's signals at some point. Licenses under the Act are carefully restricted in their scope. Section 309 (b) (1), *infra*, p. 60, provides that "The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein." Section 304, *infra*, p. 58, provides that "No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise." This provision, taken over from the Radio Act of 1927, had been embodied in an act of December 8, 1926, c. 1, 44 Stat. 917, and thus has represented consistent congressional policy.

The troublesome problem of interference from other transmitters has been committed to the Commission. Congress carefully avoided giving any semblance of right to existing stations to restrict or prevent the operation of other stations in order to permit satisfactory reception of signals. The problem is one to be dealt with by the Commission under the Act in the public interest, and not as a matter of private right. Section 307 (b) of the Act provides that the Commission, in considering applications for licenses, when and inso-

far as there is a demand for the same, "shall make such distribution of licenses, frequencies, hours of operation and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." It is clear from a reading of this section that no private rights are intended to be created or recognized thereby. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470. The duty imposed upon the Commission to provide a fair and equitable distribution of radio service was not embodied in the statute to protect the interest of those who sought or enjoyed licenses, but rather to insure the general public of the widest possible benefits from radio.

This outline of congressional policy with respect to licenses makes it plain, we submit, that it would be unwarranted to regard the order granting the application of WHDH as a modification of KOA's license even if the Court were at liberty to construe Section 312 (b) as dealing with anything more than a modification of the terms of the license itself.

3. CONSIDERATIONS OF DUE PROCESS

Respondent may not place its claim to intervention on a constitutional ground. If the statute does not contemplate intervention as a matter of right, the respondent, which has accepted the benefit of a license under the statute, is not in a position to attack its procedural provisions. Cf.

Great Falls Manufacturing Company v. *Attorney General*, 124 U. S. 581; *Wall* v. *Parrott Silver & Copper Co.*, 244 U. S. 407, 411–412; *Atlantic Refining Company* v. *Virginia*, 302 U. S. 22, 32–33.

Apart from this factor, however, the respondent has no legally protected interest which requires that it be made a party on the application of Station WHDH. We have already discussed the limited scope of the license under the statute. See pp. 31–32, *supra*. The license is not a contract with the Government giving protection against competition or electrical interference. The license is not a franchise such as was dealt with in *Frost* v. *Corporation Commission*, 278 U. S. 515, whereby those engaged in certain businesses are subject to regulations designed to take the place of competition and are entitled to complain of competition which is unauthorized. The distinction between a license under the Communications Act and a franchise granted to common carriers was emphasized by this Court in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474–475. There the Court said:

> In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the

Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia,* into an applicant's financial qualifications to operate the proposed station.

But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the

granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.

Therefore, except as the statute itself may confer a right to be heard, a licensee is not injured in a legal sense by the operation of another station. Respondent would have no standing, unless conferred by the statute, to challenge the operation of a competing station; any loss to it would be *damnum absque injuria*. *Alabama Power Company* v. *Ickes*, 302 U. S. 464; *Sprunt & Son* v. *United States*, 281 U. S. 249; cf. *City of Atlanta* v. *Ickes*, 308 U. S. 517.

Action of an administrative character may have repercussions in various directions and on many kinds of interests. The extent of these has never been regarded as the measure of the obligation to grant intervention. Thus, for example, an order of the National Labor Relations Board requiring the reinstatement of discharged employees may carry with it the necessity of supplanting subsequent employees to make room for those to be rehired. *National Labor Relations Board* v. *Mackay Radio Company*, 304 U. S. 333. Yet the Board is not obliged to treat as parties all those subsequent employees whose jobs are placed in jeopardy in the proceedings. *National Labor Relations Board* v. *Star Publishing Company*, 97 F.

(2d) 465 (C. C. A. 9). Though the two classes of employees are in a real sense competitors for the jobs, the economic impact of a potential order is not enough to give the aggrieved group standing as parties. Indeed, even where a contractual relationship is threatened by Board action, as in the case of a complaint alleging that contracts with employees are in violation of the Act, there is no obligation to make the contracting employees parties. *National Licorice Company* v. *National Labor Relations Board,* 309 U. S. 350; see also *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146, 155. In the case at bar the interest of respondent is not, as we have pointed out, founded on contract; consequently it has even less claim to the status of a party. Its legal interest, at best, is essentially no different from that of a newspaper or billboard advertising company whose revenues may be affected by the grant or extension of a license to another station. The Constitution does not confer on these the right to be made parties.

II

THE PARTICIPATION OF KOA WAS IN FACT ADEQUATE AND APPROPRIATE TO ITS INTEREST

Respondent has taken the position that it was entitled to intervene in the proceedings as a matter of right. Its petitions for intervention (R. 13, 46–49) did not contain any concrete indication of how its participation would contribute to the determina-

tion of the issues involved, nor did they suggest the character of the evidence which KOA would desire to introduce. In fact, KOA made no effort to present evidence pursuant to Rule 1.195, *infra*, p. 64. Under that rule it had the opportunity of appearing at the hearing and presenting any relevant and competent evidence which it may have had.

Respondent did, however, avail itself of the opportunity to present a brief and participate in the oral argument before the full Commission, addressing itself to the Commission's proposed findings and conclusions. Likewise, a brief and oral argument were presented on behalf of the so-called clear channel group of stations, whose interest was similar to that of respondent.

In view of the nature of the issues KOA's participation was, it is submitted, adequate and appropriate. The issues were essentially two: Whether the Commission's rules, properly applied, precluded the granting of the application; and to what extent the granting of the application would cause interference to other stations, including KOA (see notice of hearing, R. 25–26). The issues were thus one of judgment with respect to the application of a rule of the Commission in the circumstances disclosed by this licensing proceeding; and one of expert engineering advice.

So far as the question of judgment is concerned, respondent had ample opportunity to present its point of view through brief and oral argument, both

on the objections to the proposed findings and conclusions, and on the petition for rehearing which it filed and which was fully considered (R. 63–85). The argument of policy turned on the advisability of permitting additional night-time operation on a channel thereto classified as open to only one station at night; of doing so in a license proceeding and not by a comprehensive reexamination of the whole policy underlying clear channel classifications (see the concurring opinion of Chairman Fly, R. 90). The dissenting Commissioners were concerned with the effect of the order as a precedent "which may ultimately result in a discrimination against rural listeners in favor of those listeners living in metropolitan centers" (R. 44–45). The majority were satisfied that, since in this instance a grant of the application would result in more efficient use of the channel, the order was fully consistent with sound and established policy (R. 79–83). They stated: "The amendment merely affects a minor shift in one frequency within the established policy" (R. 83). On these matters respondent spoke its mind orally and in writing, and its views were carefully considered and discussed in the opinions of the Commission. It is difficult to see how formal intervention as a party would have enabled respondent to present its arguments more effectively. Even a party to the Commission's proceedings must await the proposed findings and conclusions before making its argument.

With respect to the issue of engineering advice, it is important to observe that the Commission utilized the service of an expert witness on its own staff, who was question by the trial examiner and cross-examined by counsel for the applicant and intervenor WEEU. The nature of the engineering evidence was such as to warrant a limitation on the number of parties who might participate in its presentation. The issue was not one having peculiar relation to facts within respondent's knowledge. The issue did not concern respondent's method of operation, or its ability to continue rendering service in the public interest if the application of WHDH were granted. The issue concerned standards of engineering practice which have been embodied in documentary form by the Commission. See *Standards of Good Engineering Practice Concerning Standard Broadcast Stations* (Revised to July 20, 1940), especially pages 1–21. The testimony was largely an application of those standards to the admitted facts, such as the distances involved, the authorized power of the stations, the present existence of electrical interference from stations on adjacent channels, and the directional character of the WHDH antenna. These matters resolved themselves into computations and the exercise of the Commission's judgment on the basis of the data so computed. When the Commission issued its proposed findings and conclusions, respondent had an opportunity to point

out any inaccuracy which it deemed to exist therein; but its second petition for intervention did not attack the accuracy of the findings of engineering facts.

Not only the nature of the factual issues, but also the slight interest which KOA had on the ground of electrical interference, justified the character of its participation in the proceedings. The Commission found that any interference which the operation of WHDH as granted might reasonably be expected to result to KOA would be limited to interference with intermittent reception in the eastern part of the United States, remote from the station; and that such secondary service as KOA could render in this area would be of uncertain character because of its dependence upon the characteristics of the individual receiver, the signal intensity, and the signal-to-interference ratio involved in each individual case (R. 32, 83–84). The basis of this finding requires some exposition of the measurement of electrical interference caused by the simultaneous operation of two or more stations on the same or adjacent frequencies.

Radio transmitters produce measurable electromagnetic effects in an area surrounding them. The size of the area depends upon many factors, including the power, frequency, absorption or conductivity characteristics of the area, sensitivity of the measuring devices, etc. The strength of the effect at any point is referred to as the field inten-

sity at that point and is usually expressed in units called millivolts per meter (mv/m) or microvolts per meter (uv/m).[13] A radio receiver converts such electro-magnetic effects into sound.[14]

At any given point, at any given time, there are present electro-magnetic fields in almost any frequency range which are of enough intensity to be translated into sound by a radio receiver of sufficient sensitivity. If it is desired to produce the sounds of one of those fields and exclude the sounds of the others satisfactorily to the average listener, the desired field must have an intensity or strength of approximately twenty times the intensity of the undesired fields present at the point of reception if the fields are produced by emissions on the same frequency (channel). A smaller ratio is sufficient if the fields are produced by emissions on a different frequency (channel). Unless the desired signal has the relative strength of approximately twenty times that of the undesired signal on the same channel, the sounds produced by both signals can be heard with the undesired signal creating a background noise or interference precluding the satisfactory reception to the average listener of the desired signal.

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[13] One millivolt equals one thousand microvolts.

[14] The following exposition is based upon the Commission's "Standards of Good Engineering Practice" referred to at p. 40, *supra*.

The minimum field intensity for acceptable service varies from approximately 0.1 mv/m in sparsely settled northern areas in winter, where so-called man-made noise from electrical devices as well as natural static is at a minimum, to approximately 50 mv/m in highly industrialized areas where man-made noise is high.

One radio station is considered to cause "objectionable interference" with the reception of another operating on the same channel at a given point if it produces at that point for more than 10 per cent of the time [15] a field which exceeds in intensity 5 per cent ($\frac{1}{20}$) of the field produced at the point by the desired station. From the fact that a field with an intensity of more than $\frac{1}{20}$ of intensity of another field will interfere with satisfactory reception of signals from the latter field, it is obvious that the interference or nuisance range of a station extends considerably beyond its satisfactory service or reception range.

Radio stations transmit radio frequency energy in all directions from the antenna. That portion of the energy which travels out along the earth's surface is known as the ground wave and that portion which is radiated upward is known as the skywave. In the case of standard broadcast sta-

[15] The time element in the definition of interference is included because during nighttime the field produced by the interfering station is usually a fluctating rather than a constant quantity.

tions, no reflection of consequence takes place during the daytime; consequently during the day these skywaves continue upward indefinitely and, hence, it is only the ground wave which can be received. At night, however, the skywave, instead of traveling upward indefinitely, strikes masses or layers of heavily ionized air found at night from 30 to 250 miles above the surface of the earth. This ionized air, called the ionosphere, acts as a mirror, reflecting the skywave back to the surface of the earth, so that at night listeners beyond the range of the ground wave can hear a distant station's skywave reflected back from the ionosphere.

Ground-wave service can be received both day and night. Skywave service, which can be received only at night, is called "secondary service." Reception from the ground wave is relatively constant and can be depended upon for reception day after day except in areas of low signal strength during periods of high atmospheric noise. "Primary service" is generally referred to as the ground wave service not subject to objectionable interference or objectionable fading and "intermittent service" is classified as ground wave service beginning where the primary service ends and extending out to points where the service is no longer usable.

"Secondary" or skywave service is variable both as to signal strength and as to percentage of time the signal is usable. In general, however, these

two variables are related in that as the distance from the station is increased, the signal becomes weaker and simultaneously usable for a relatively smaller percentage of time. At even extremely great distances the signals may occasionally be satisfactory for certain periods of time. Consequently there is no sharp line of demarcation within which the secondary service is satisfactory and outside of which the secondary service is unusable or unsatisfactory.

Under the Commission's plan of broadcast allocation, only Class I stations are assigned on the basis of rendering secondary service. By definition of the Standards of Good Engineering Practice, secondary service is rendered in the areas where the skywave for 50 per cent of the time has a field intensity of 500 uv/m or greater. The secondary service of a Class I–A station is considered as having this limit for determination of service in comparison with other stations.

As determined by the Standards of Good Engineering Practice, in the case of a 50-kilowatt station, such as KOA, the 500 uv/m 50%-of-the-time contour would have a radius of approximately 715 miles. At greater distances the signals are weaker and usable for a smaller portion of the time. Station WHDH operating as proposed will not cause objectionable interference to the reception of Station KOA as determined by these standards at any point within the latter's 500

uv/m 50%-of-the-time contour.[16] Thus the interest of KOA is remote.

In sum, respondent in fact was afforded a hearing appropriate to the issues and to its interest. Indeed, the prevailing opinion in the court below suggests that "the extent of participation actually allowed may have been substantially all that a party was entitled to have," though the opinion adds that the participation should have been afforded as a matter of right and not of favor (R. 205). It is difficult to ascertain how respondent was aggrieved by the difference in designation if in substance what it received and what it was entitled to were all one. The opinion of Justice Edgerton puts it this way (R. 212–213):

> Appellant was entitled to no more than a hearing reasonably adequate to protect its interests and reasonably practicable for the Commission and the public; in other words, to a fair opportunity to bring its facts and arguments to the Commission's attention. It had such a hearing—whether of right or of grace we need not inquire. * * *

[16] This area of 715-mile radius is shown on WHDH's Exhibits 24 and 28 (R. 118, 119). It will be seen that this radius is short of the line or band at which the interference ratio of WHDH to KOA becomes 1 to 20, as shown by the straight lines on the Commission's Exhibit 1 (R. 143-A; the colors and comment are not on the original exhibit).

III

THE STANDING OF RESPONDENT TO APPEAL

Two members of the court below (Justices Miller and Edgerton) were of opinion that respondent had no standing to appeal as a "person aggrieved or whose interests are adversely affected" within the meaning of Section 402 (b) (2). We submit that this view is sound, in the light of the facts already discussed concerning the extent of interference involved (pp. 45–46), and the allegations on appeal.

Describing the notice of appeal, Justice Edgerton said (R. 211):

> Appellant's notice of appeal, though it alleges "substantial modification" of its license, alleges neither substantial injury nor any facts which constitute substantial injury. It alleges nothing more injurious than "interference to KOA in areas where KOA's signal is now interference free." This allegation would be supported if it were shown that in some small area, thousands of miles from Denver, and of no actual or potential importance to appellant, a few listeners could and did at rare intervals get, without interference, a feeble signal from KOA, and that their reception of that signal would be made a little worse by WHDH's modification. I think such an allegation would not show standing to appeal. * * *

It is clear, on the authority of *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, that a person "aggrieved" by the grant of a license to another has no legally protected interest apart from the statutory right to appeal, and that the appellant must invoke the public interest in attacking the order. An appellant must show at least an adverse interest in fact, of a substantial and immediate kind, as distinguished from an interest merely in the principle involved or in possible future contingencies. Otherwise the provision for appeal would run afoul of the requirement of case or controversy. *Muskrat* v. *United States*, 219 U. S. 346; *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n*, 303 U. S. 419, 443; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 132; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241. Whatever may be the constitutional status of the Court of Appeals for the District of Columbia,[17] it is at least clear that in the absence of a case or controversy the proceeding could not come to this Court,[18] and it is not to be supposed that Congress intended review proceedings to be brought in the court below unless they were subject to the normal review here. Cf. *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266. The requisite interest for appeal in the case of a commercial station such as respondent is presum-

[17] *O'Donoghue* v. *United States*, 289 U. S. 516.

[18] *Federal Radio Comm'n* v. *General Electric Co.*, 281 U. S. 464.

ably a showing of financial detriment. "Congress * * * may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license." *Federal Communications Commission* v. *Sanders Bros. Radio Station, supra, at* 477. Respondent made no allegation of financial damage and doubtless could not, in view of the tenuous character of the effect of WHDH's proposed operations upon KOA's area of useful service.

Insistence on a showing of substantial detriment is particularly important in view of the uncertainty which has surrounded certain expressions by this Court in the *Sanders* case, *supra*. Recently the Circuit Court of Appeals for the Second Circuit has explained the *Sanders* case as deciding that a statute may validly confer authority on private persons to represent the public interest in litigation as "so to speak, private Attorney Generals." *Associated Industries of New York State* v. *Ickes*, decided February 8, 1943. Appellants under Section 402 (b) have also been compared to "King's Proctors." *Colorado Radio Corporation* v. *Federal Communications Commission*, 118 F. (2d) 24, 27 (App. D. C.) If these analogies are pressed, the *Sanders* case will be applied beyond permissible bounds. Even in the historic *qui tam* actions, the

informer brought suit to recover a penalty on his own behalf "as well as" on behalf of the state.

If the Court should be of opinion that respondent does have sufficient financial interest to entitle it to appeal under the *Sanders* decision, we suggest that the meaning of Section 402 (b) (2) be examined in the light of recent decisions in which this Court has had occasion to deal with the review provisions of the Act. The conclusion in the *Sanders Brothers* case, that standing to appeal as a "person aggrieved or whose interests are adversely affected" does not require a showing of a legal interest apart from the review provision itself, was based largely on the failure of the Commission to indicate any other substantial effect for the language quoted. The recent cases in this Court have shown, we believe, that the language does have substantial effect when limited to the vindication of legal interests.

In the first place, there are persons apart from the applicant who do have legal interests which Section 402 (b) (2) serves to protect by making available a remedy by appeal to the court of appeals. The grant of an application for renewal or modification of a license may involve a requirement that the applicant terminate or alter contractual relations with others, such as network organizations. In that event the network would undoubtedly suffer an invasion of a legal interest and could avail itself of the remedy of appeal under Section 402 (b) (2), just as it could proceed under the

Urgent Deficiencies Act, as incorporated in Section 402 (a), if the Commission's action were taken on the Commission's own motion. These avenues of review under the statute were recognized in *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 423–424, where it was held that the existence of these remedies did not preclude an attack on the regulations in question under Section 402 (a) prior to their application in license proceedings. Other kinds of contractual arrangements might also be affected by Commission action; where the action is taken on an application by the licensee, the remedy afforded by Section 402 (b) (2) to these legally interested parties is a substantial one.

In the second place, the history of the review provision in question indicates that its purpose was not to create new rights but only to allocate review proceedings between district courts and the Court of Appeals for the District of Columbia. Prior to 1930, the Radio Act of 1927 gave to the Court of Appeals jurisdiction of appeals by an applicant or by a licensee whose license had been revoked;[19] other review proceedings were not pro-

[19] "Sec. 16. Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is revoked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within

vided for in the statute and were thus left to the general jurisdiction of courts of equity.[20] In 1930, as a result of this Court's decision in *Federal Radio Comm'n* v. *General Electric Co.*, 281 U. S. 464, Section 16 was amended. The primary purpose of the amendment was to change the character of the appeal under Section 16 from an administrative to a judicial proceeding. See *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 275. As amended, Section 16 unified the review procedure by requiring all appeals from Commission action granting, renewing, revoking, modifying, or suspending a license to be brought in the Court of Appeals. It was provided that appeals could be taken (1) by an applicant whose application was refused, (2) by a licensee whose license was revoked, modified or suspended, and (3) "by any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the commission granting or refusing any such application or by any decision of the commission revoking, modifying, or suspending an existing station license".[21] Nowhere in the debates

twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor." (44 Stat. 1162, 1169.) District Courts shared the statutory jurisdiction in cases of revocation, it will be observed.

[20] For extra-statutory suits, see *Hoover* v. *Intercity Radio Co.*, 286 Fed. 1003 (App. D. C., 1923) (mandamus, prior to 1927 Act, to compel renewal); *Saltzman* v. *Stromberg-Carlson Mfg. Co.*, 46 F. (2d) 612 (App. D. C., 1931) (enjoining change in petitioner's frequency).

[21] Act of July 1, 1930, c. 788, 46 Stat. 844.

or committee reports was it suggested that the third category was intended to embrace a broader group than could theretofore have brought suit in equity in the district courts.[22] Indeed in view of the primary concern of Congress at this juncture to avoid the constitutional difficulties disclosed by the decision in the *General Electric* case, *supra*, it is hardly likely that further constitutional problems would have been introduced by authorizing appeals on the part of persons having an interest which would have been insufficient theretofore.

Finally, the Communications Act of 1934 made a further change in the allocation of jurisdiction. Section 402 once more divided jurisdiction between the district courts and the Court of Appeals; this division was based on considerations of convenience to litigants, being dependent on whether the proceeding had been instituted by an applicant or licensee or by the Commission. In the former event, appeal was to the Court of Appeals under Section 402 (b); in the latter event, it was to the district courts under the Urgent Deficiencies Act. This allocation of jurisdiction is explained in *Columbia Broadcasting System, Inc.* v. *Federal Communications Commission*, 316 U. S. [redacted], and *Scripps Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4. The effect is that all appeals growing out of decisions in

[22] See 72 Cong. Rec. 9521, 11529, 11553, 11749, 11881; also H. Rep. 1665 and S. Rep. 1105, 71st Cong.

proceedings brought by applicants or licensees must be taken to the Court of Appeals, whether by the applicant or licensee or any other party "aggrieved or whose interests are adversely affected." In other cases all appeals must be taken to the district courts, whether by licensees or persons aggrieved.

This legislative history strongly indicates, it is submitted, that the nature of the appealable interest required under Section 402 (b) (2) is no different from that required under the Urgent Deficiencies Act. Indeed, the same action of the Commission is reviewable in one or the other forum depending on how the proceedings were instituted. This was pointed out in the *Scripps Howard* case, *supra*.[23] It is clear that under the Urgent Deficiencies Act an order may be attacked only by a

[23] "* * * But while the two sections route appeals to different courts, the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform. For example, if the Commission on its own motion modifies a station license, review is had under § 402 (a) in the appropriate district court. However, if it grants an application for modification of license, an appeal lies under § 402 (b) to the Court of Appeals for the District of Columbia. Both cases give rise to the same kind of issues on appeal. Both orders are equally susceptible of being stayed on appeal. As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington in situations where the Commission's order arose out of a proceeding not instituted by the licensee."

person having a legal interest, or, as it was put in the *Columbia Broadcasting* case, *supra*, by one having "a cause of action in equity." See also *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 132, 136. Some affirmative showing should be made, we believe, that the two sections were meant to prescribe different requisites for appealable interest before that conclusion is finally accepted by the Court. Otherwise the incongruity results that, for example, respondent's right to attack the modification of the license of WHDH turns on whether the modification was ordered in a proceeding begun by WHDH or by the Commission on its own motion. This result should be avoided, particularly in view of the history of the legislative provisions and the meaning which Section 402 (b) (2) carries when it is interpreted as we suggest.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decree of the court below should be reversed.

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APPENDIX

Communications Act of 1934:

SECTION 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or

with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * * *

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the

Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

* * * * *

SEC. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

* * * * *

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * * *

(d) No license granted for the operation of a broadcasting station shall be for a

longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

* * * * *

SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it; * * *

* * * * * * *

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee fur-

ther written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

* * * * *

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

* * * * * *

SEC. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the

judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

* * * * *

SEC. 402. * * * (b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

* * * * *

SECTION 501. Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission

or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

SEC. 502. Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

Rules and Regulations of Federal Communications Commission:

SEC. 1.102. *Intervention.*—Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest, and must be subscribed or verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of

hearing unless on motion the Commission shall amend the same.

* * * * *

SEC. 1.195. *Communications relating to applications.*—There will be maintained in the office of the secretary of the Commission a record of all communications received by the Commission relating to the merits of any application pending before the Commission requesting the granting, renewal, modification, or revocation of any license or construction permit, certificate of convenience and necessity, or rate schedule. Such record shall show the name and address of the person making the statement and the substance of such statement. When the date of hearing has been set, if the matter is designated for hearing, the secretary shall notify all persons shown by the records to have communicated with the Commission regarding the merits of such matter in order that such persons will have an opportunity to appear and give evidence at such hearing: *Provided,* That in the case of communications bearing more than one signature, notice shall be given to the person first signing unless the communication clearly indicates that such notice should be sent to someone other than such person.

No such person shall be precluded from giving any relevant material and competent testimony at such hearing because he lacks a sufficient interest to justify his intervention as a party in the matter.

No such communication will be considered by the Commission in determining the merits of any such matter nor shall any such communication be considered by any examiner unless it has been introduced into evidence at the hearing and appears as a

part of the record. The admissibility of any such communication or the secretary's record of any such communication shall be governed by the applicable rules of evidence, and no such communication shall be admissible on the basis of a stipulation unless Commission's counsel as well as counsel for all of the parties shall join in such stipulation.

Such communications, however, may be considered by the Commission if circumstances warrant in deciding whether or not a matter shall be set down for hearing in cases where in the absence of such communication no hearing would be required by the Commission.

* * * * *

SEC. 3.21. *Three classes of standard broadcast channels.*—(a) *Clear channel.*—A "clear channel" is one on which the dominant station or stations render service over wide areas and which are cleared of objectionable interference within their primary service areas and over all or a substantial portion of their secondary service areas.

(b) *Regional channel.*—A "regional channel" is one on which several stations may operate with powers not in excess of 5 kilowatts. The primary service area of a station operating on any such channel may be limited, as a consequence of interference, to a given field intensity contour.

(c) *Local channel.*—A "local channel" is one on which several stations may operate with powers not in excess of 250 watts. The primary service area of a station operating on any such channel may be limited, as a consequence of interference, to a given field intensity contour.

SEC. 3.22. *Classes and power of standard broadcast stations.*—(a) *Class I station.*—A "class I station" is a dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances. Its primary service area is free from objectionable interference from other stations on the same and adjacent channels, and its secondary service area free from interference, except from stations on the adjacent channel, and from stations on the same channel in accordance with the channel designation in section 3.25 or in accordance with the "Engineering Standards of Allocation." The operating power shall be not less than 10 kilowatts nor more than 50 kilowatts. (Also see section 3.25 (a) for further power limitation.)

(b) *Class II station.*—A "class II station" is a secondary station which operates on a clear channel (see section 3.25) and is designed to render service over a primary service area which is limited by and subject to such interference as may be received from class I stations. A station of this class shall operate with power not less than 0.25 kilowatts nor more than 50 kilowatts. Whenever necessary, a class II station shall use a directional antenna or other means to avoid interference with class I stations and with other class II stations, in accordance with the Engineering Standards of Allocation.

(c) *Class III station.*—A "class III station" is a station which operates on a regional channel and is designed to render service primarily to a metropolitan district and the rural area contiguous thereto. Class III stations are subdivided into two classes:

(1) *Class III–A station.*—A "class III–A station" is a class III station which operates with power not less than 1 kilowatt nor more than 5 kilowatts, and the service area of which is subject to interference in accordance with the Engineering Standards of Allocation.

(2) *Class III–B station.*—A "class III–B station" is a class III station which operates with a power not less than 0.5 kilowatt nor more than 1 kilowatt night and 5 kilowatts daytime, and the service area of which is subject to interference in accordance with the Engineering Standards of Allocation.

(d) *Class IV station.*—A "class IV station" is a station operating on a local channel and designed to render service primarily to a city or town and the suburban and rural areas contiguous thereto. The power of a station of this class shall not be less than 0.1 kilowatt nor more than 0.25 kilowatt, and its service area is subject to interference in accordance with the Engineering Standards of Allocation.

* * * * *

SEC. 3.25. *Clear channels: Class I and II stations.*—The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations are given:

(a) To each of the channels below there will be assigned one class I station and there may be assigned one or more class II stations operating limited time or daytime only: * * * The power of the class I stations on these channels shall not be less than 50 kilowatts.

(b) To each of the channels below there may be assigned class I and class II stations: * * *

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No. 585.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

NATIONAL BROADCASTING COMPANY, INC. (KOA), *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF RESPONDENT IN OPPOSITION.

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BRIEF OF RESPONDENT IN OPPOSITION.

OPINION.

The opinion of the United States Court of Appeals for the District of Columbia, not yet officially reported, appears in the record at pages 183-213.

JURISDICTION.

Petitioner invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code. (28 U. S. C. A. 347(a))

SUPPLEMENTAL STATEMENT OF FACTS.

Petitioner has made much of the fact that Mr. Justice Rutledge, in his opinion below, has suggested that respondent's right to participate in the proceedings did not arise until after December 16, 1940. This makes necessary the submission of a brief supplemental factual statement demonstrating the significance of that date.

When the Commission is unable to conclude from an examination of an application that it should be granted in the public interest, it has been its practice for many years to designate the application for hearing and to issue a "Notice of Hearing" setting forth the issues to be met by the applicant. In this proceeding, the first Notice of Hearing was dated September 2, 1939 (R. 11). It stated, *inter alia*, that the purpose of the hearing would be:

> "3. To determine whether public interest, convenience or necessity would be served by modifying the Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III), to authorize the operation of WHDH as proposed."

Being then on notice that the Commission contemplated a change in those regulations which precluded a grant of the WHDH application, respondent filed a petition to intervene on September 23, 1939, which was denied on September 29, 1939 (R. 13). The character of the proceedings then within the contemplation of the Commission and of the parties is further evidenced by the Commission's action on November 20, 1939 when it designated Commissioner Case to preside at the hearing (R. 25). Under Section 409 (a) of the Statute, the Commission may not assign to an Examiner any hearing which involves a change of policy or a new kind of use of frequencies.

But no hearing was held under this first Notice. Instead, on December 2, 1939, the Commission, on its own motion, rescinded the Notice of September 2 and issued a second

Notice which indicated that the purpose of the hearing would be:

> "1. To determine whether or not the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III) properly interpreted and applied, preclude the granting of the application;"

The hearing held on January 29 and 30, 1940, was held under this second Notice before Examiner Hyde of the Commission (R. 27). Since it involved merely the *construction* of Commission Rules as distinguished from a *proposal to modify* them, it was an appropriate subject for hearing before an Examiner under Section 409(a).

On December 9, 1940, the Commission released its "Proposed Findings of Fact and Conclusions" based upon the hearing which had been held on January 29 and 30, 1940 (R. 27-46). Five members of the Commission participated of whom two dissented. All five agreed that Sections 3.22 and 3.25 of the Commission's Rules did preclude the granting of the WHDH application (R. 30, 35, 45). Up to this point, the second Notice was controlling, the hearing before an Examiner had been proper and had the decision been based upon this interpretation the case would have been closed.

But at this point, three members of the Commission determined that the Rules should be modified to permit the granting of the WHDH application and having done so, voted to grant the application (R. 27-32). Respondent then filed its second petition to intervene on December 16, 1940 (R. 46-49) which was denied on January 7, 1941 (R. 50). On April 7, 1941, the Commission adopted its final order amending Section 3.25 of its rules and granting the WHDH application (R. 50). Commissioners Case and Craven dissented. Respondent's petition for rehearing, filed under Section 405 of the Act (R. 52), was denied on May 20, 1941 (R. 63) and the appeal to the Court of Appeals for the District of Columbia followed on June 7, 1941 (R. 1).

ARGUMENT.

In its reasons for the allowance of the writ petitioner relies almost entirely upon some differences of views expressed by the several members of the Court below. It points out that "On September 12, 1942, the Court handed down five opinions * * *"[1] and complains of the "uncertainty resulting from the diverse views in the opinion below".[2] Asserting its inability to comprehend the effect of the decision, the Commission states:

> "Not only is it difficult to determine what is required of the Commission on the remand * * *, but the Commission cannot with assurance follow an intervention procedure which will command the approval of a majority of the members of the Court below."[3]

At the outset it should be observed that two of the "Five opinions" creating petitioner's "uncertainty", are dissents and thus in no way add to the Commission's alleged perplexity in dealing with the instant case or in administering its intervention procedure generally in the future.

Of the remaining three opinions, Mr. Justice Rutledge, speaking for the court, held:

> "For the error in excluding appellant from participation as a party in the final and controversial stage of the procedure, contrary to the requirement of Section 303(f) of the Act, the order must be reversed, with directions to afford appellant opportunity for hearing in accordance with the provisions of that Section."

Chief Justice Groner and Mr. Justice Vinson, in a joint concurring opinion, stated:

> "We are in agreement with Judge Rutledge that under Section 303(f) the Commission should have afforded appellant the right to participate in the hear-

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[1] Petition herein, Page 10.

[2] Petition herein, Page 8.

[3] Petition herein, Page 10.

ing as a party. But we are also of the opinion that, * * * Section 312(b) of the Act also provides a right of participation by appellant in the proceedings under that application. *While the question is no longer material here—since we assume that, in the present state of the record, the Commission will reopen the proceedings and permit the intervention of appellant as a party* —we express our disagreement with the view of Judge Rutledge that the Commission, in its discretion may exclude appellant from participation until after the proposed findings of fact have been made. * * *" (Italics supplied)

Mr. Justice Stephens concurred in Judge Rutledge's conclusion that appellant had a right of appeal as well as to intervention and also noted agreement "with the views and conclusions expressed by Justices Groner and Vinson in their separate opinion". Further, Mr. Justice Stephens pointed out that the right to be heard under the circumstances in the instant case could not be denied in view of the Fifth Amendment to the Constitution.

The circumstance of these separate opinions is advanced by petitioner as the underlying reason for the issuance of the writ. Respondent submits that for two reasons the asserted basis for invoking the Court's jurisdiction is insubstantial and does not warrant the exercise of this Court's discretion in petitioner's favor.

In the first place, there can be no real dispute that the Court has advised the Commission of its duties in the case before it. Certainly it should not be urged that the Court is under a duty over and above this to outline rules of conduct generally for the Commission's guidance in matters not pertinent or necessary to a decision on the case before it.

Mr. Justice Rutledge made this clear when he said:

"Without attempting therefore to blueprint the procedure to be followed with respect to the extent of appellant's (respondent's) participation in another hearing, we may leave such matters to the Commission's

> judgment, where they properly belong, subject only to compliance with the basic requirements of fair play and adequate opportunity to be heard."

And Mr. Chief Justice Groner and Mr. Justice Vinson, in their concurring opinion, added[4] "* * * in the present state of the record, the Commission will reopen the proceedings and permit the intervention of appellant as a party * * *." This clearly and unmistakably outlines the duty of the Commission under this decision. If members of the Court constituting a majority differed among themselves on matters related to, but not a part of, the final disposition of the case, such differences have no effect upon petitioner in carrying out the order of the Court to reopen the proceeding below and afford the respondent an opportunity to be heard. This result is unaffected by whatever divergence of views may have been expressed as to the reasons for this result, nor can the Commission complain of its inability intelligently to proceed in the case before it merely because of differences as to what respondent's rights would have been if the circumstances were different from those actually before the Court.

Secondly, it should be observed that this is not a case where *certiorari* is sought in order to clarify the law presently in a confused state because of a divergence of views among several different Circuit Courts of Appeal. The situation here is entirely different. If the petitioner were correct in its assumption that the conflict between the views of the four members of the Court constituting a majority made it difficult for it "to determine what is required of the Commission on the remand in the present case", it could and should have adopted the traditional and logical method of returning to the Court below for clarification and guidance. As this Court has said:

> "To be sure the Court that issues a mandate is normally the best judge of its content on the general

[4] Joined in by Mr. Justice Stephens.

theory that the author of a document is ordinarily the authoritative interpreter of its purpose.'"[5]

CONCLUSION.

It is respectfully submitted that the petition sets forth no substantial ground for the issuance of the writ of *certiorari*.

Respectfully submitted,

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Of Counsel.

January 9, 1943.

[5] *F. C. C.* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 141.

PROOF OF SERVICE.

Service of a copy of the foregoing Brief of Respondent in Opposition and receipt of a true and correct copy hereby is acknowledged this 9th day of January, 1943.

SOLICITOR GENERAL

By .....

FEDERAL COMMUNICATIONS COMMISSION

By .....

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IN THE

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October Term, 1952.

No. 385.

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

NATIONAL BROADCASTING COMPANY, Inc., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinions in the United States Court of Appeals for the District of Columbia reported at 132 Fed. (2nd.) 545 appear at pages 183-213 of the record.

The Findings of Fact and Conclusions of the Commission are at pages 27-46 of the record. The Commission's Order with the dissenting memorandum of Commissioners Case and Craven is at pages 50-52 of the record.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended.

QUESTIONS PRESENTED.

The questions presented are:

1. Did Respondent have a right to appeal under Sec. 402 (b)(2) of the Statute?

2. Was Respondent entitled, as a matter of right, to a hearing before the Commission on the WHDH application before said application was granted?

3. If so, were the requirements of the statute and of due process satisfied when Respondent was permitted to file a brief and make oral argument *amicus curiae*?

4. Did Respondent, under the circumstances in this case, have a right to rehearing under Sec. 405 of the Statute?

5. Were the Commission's proceedings valid under Section 409(a) of the Statute?

6. Were the proceedings, including the Commission's failure to observe its own rules, so arbitrary and capricious as to invalidate the results reached?

STATUTES AND TREATY INVOLVED.

In addition to the sections of the Communications Act and of the Commission's Regulations appearing at pp. 63-67 of Petitioner's Brief, Respondent regards as pertinent Sec. 1.71 and 1.72 of the Commission's Regulations; Sec. 405 and 409(a) of the Communications Act and par. B 8(d) of Part II of the North American Regional Broadcasting Agreement. These are printed as an appendix to this Brief at p. 48.

STATEMENT.

Respondent considers the following statement necessary in addition to that contained in Petitioner's Brief.

The Commission has found that there will be interference to KOA from WHDH in the eastern part of the United States (R. 32). This interference to KOA's secondary sky-wave service, which exists only at night, is the interference of which Respondent complains. If the injury to KOA and to the public is to be evaluated, the nature and function of secondary service and the distinction between primary and secondary service must be understood.[1]

Though sky-wave signals vary in intensity, nearly all receivers now in use employ automatic volume control which permits a constant output from the loudspeaker despite variations in the incoming signals. The Petitioner's Brief, at page 45, concedes that, in the absence of interference, "there is no sharp line of demarcation within which the secondary service is satisfactory and outside of which the secondary service is unusable or unsatisfactory." The phenomenon of sky-wave reflection plays an important part in the Commission's Allocation Plan.

It is one of the Commission's duties under Sec. 307(b) of the Statute to maintain a "fair, efficient and equitable distribution of radio facilities." Responsive to this section of the Act, the Commission in its Report to Congress for the year 1938 set forth the results of a study of service rendered by United States standard broadcast stations. (FCC 4th Annual Report, App. F, p. 180 et seq.) This study reveals that at night, because they live outside the primary service area of any broadcast station, 5.6 per cent of the urban population and 32.4 per cent of the rural population, which together equal 21,308,453 persons or 17.4 per

[1] The Commission asserts that the operation of WHDH will not cause interference to KOA within KOA's primary service area—i. e. within 100 miles of Denver where KOA delivers a relatively constant ground-wave signal day and night (R. 32). We do not dispute this assertion.

cent of the total population of the United States, have no broadcasting service except sky-wave signals from clear-channel stations (FCC 4th Annual Report, Table VI, pp. 198-199). The study further discloses that the areas in which listeners must depend upon secondary service comprise 56.9 per cent of the total land area of the United States (FCC 4th Annual Report, Table VIII, pp. 202-203).[2]

KOA, one of the stations upon which this audience must depend, has been operated continuously at Denver, Colorado, since December 15, 1924 (R. 2). From November 11, 1928, until April 7, 1941, the date upon which the Commission granted the WHDH application, KOA was licensed to operate on a frequency classified first by the Federal Radio Commission and thereafter by the Federal Communications Commission as a clear-channel upon which only one station would be permitted to operate during night hours (R. 2, 3, FCC Regs. Sec. 3.22, 3.25).

Consequently, during this period of more than twelve years, KOA's signals throughout the United States were free of co-channel interference at night from any station located within the United States. In addition, prior to the action of the Commission in this case, KOA's signals throughout the United States were both free and entitled to remain free of co-channel interference from any station in Canada, Mexico or Cuba under the provisions of the North American Regional Broadcasting Agreement (R. 41, 42).

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[2] In its Report to Congress for 1936, the Commission submitted a survey of rural listener preferences for clear, regional, and local channel stations which showed (F.C.C. 2d Annual Report, p. 64):

"National rural listener preference by channels

Station Classification	Per cent	Number of stations licensed
Clear channel	76.3	95
Regional channel	20.6	277
Local channel	2.1	256
Foreign	1.0	....

As one result of the Commission's Order of April 7, 1941, granting the WHDH application, KOA does not now render interference-free night service east of a line drawn from northern Minnesota to central Michigan thence to Louisiana—roughly the area lying east of the Mississippi River (Applicant's Ex. A at R 143).

As a second result of the Commission's Order of April 7, 1941, Canada, Mexico and Cuba, the other signatories to the North American Regional Broadcasting Agreement, have, or may acquire, the right to operate stations which cause co-channel interference at night on 850 kilocycles within the United States, a right which they did not have prior to the Order (R. 41, 42).

The service formerly available from KOA to listeners living east of the Mississippi River has not been replaced by an equally useful service from WHDH. On the contrary, WHDH does not render a useful service beyond an area, roughly semi-circular, not more than 60 miles by 30 miles at its greatest dimensions with Boston as its mid-point (Intervenor's Ex. 20, R. 115). At least eight stations in addition to WHDH render primary service at night to all or parts of this Boston area.

Thus the grant to WHDH adds another primary service to an area already surfeited with primary reception while listeners east of the Mississippi River, many of whom get only sky-wave service, except those in the immediate vicinity of Boston, have suffered a net loss of one secondary service under the Order of April 7, 1941.

Notwithstanding that the Regulations of the Federal Radio Commission and of the Federal Communications Commission at all times precluded the operation of a second station at night on KOA's frequency, between 1929 and 1938 Matheson Radio Company filed nine separate applications each of which requested unlimited time operation for WHDH on the KOA clear-channel. All of these applications prior to the one which is involved in the instant case, dated July 27, 1938, were dismissed or denied by the Commission (R. 54, Footnote 1, 2).

When the WHDH application of July 27, 1938 was filed, and at all times since, the Commission's Rules of Procedure have prescribed that an application not filed in accordance with its regulations will be considered defective, will not be considered by the Commission and will be returned to the applicant (Sec. 1.71 on p. 48 of the Appendix to this Brief). Its Rules further provide that where an applicant desired to challenge the validity or wisdom of any rule or regulation, he should submit a formal Petition setting forth the desired change and his reasons in support thereof (R. 54, Sec. 1.72 at p. 48 of the Appendix to this Brief). No such petition was ever filed on behalf of WHDH (R. 55, Footnote 3).

All of these Rules and Regulations were in effect, when, on September 2, 1939, the Commission issued its first Notice of Hearing (R. 11). This Notice indicated that, even in the absence of a Petition from the Applicant, the Commission might make some changes in Sec. 3.22 and 3.25 of its substantive regulations. Respondent sought to intervene (R. 13). Its Petition was denied by Commissioner Payne (R. 13-20) and his action was affirmed by the Commission (R. 21-24).

On September 29, 1939, Respondent moved to dismiss the WHDH application for its failure to conform to the Commission's Rules and Regulations (R. 20-21). This motion was denied on December 5, 1939 (R. 26, 27).

Meanwhile, on November 20, 1939, the Commission had designated Commissioner Case to preside at the hearing (R. 25). This designation is significant in view of the type of notice then outstanding and the provisions of Sec. 409(a) of the Statute limiting the kind of hearings which can be assigned to an Examiner (App. p. 49).

But no hearing was held under the original Notice of September 2, 1939. Instead, on December 2, 1939, the Commission issued a new Notice of Hearing (R. 25, 26). This second Notice, particularly when contrasted with the first, indicates that the Commission no longer contemplated a *mod-*

ification of Sections 3.22 and 3.25 but intended merely to give the Applicant an opportunity to *construe* them in the Applicant's favor, if that were possible (R. 25, 26). This being an appropriate subject for hearing before an Examiner under Sec. 409(a) of the Statute, Commissioner Case was relieved and Mr. R. H. Hyde was assigned as an Examiner to preside at the hearing (R. 27).

The hearing was held on January 29 and 30, 1940; the Respondent not being allowed to appear as a party. On December 9, 1940, the Commission released its "Proposed Findings of Fact and Conclusions" (R. 27-46). Five members of the Commission participated of whom two dissented. All five agreed that Sec. 3.22 and 3.25 of the Commission's Regulations did preclude the granting of the WHDH application (R. 30, 35, 45). Having reached this conclusion, three members of the Commission, without further notice or hearing to anyone, voted to modify Sec. 3.22 and 3.25 and having done so, voted to grant the WHDH application (R. 27-32). Respondent then filed its second Petition to Intervene on December 16, 1940 (R. 46-49) which was denied on January 7, 1941 (R. 50). Thereafter on its own motion and not at the request of Respondent, the Commission allowed both Respondent and the "clear-channel group" to file briefs and make oral argument *amicus curiae*. On April 7, 1941, the Commission adopted its final Order amending Sec. 3.25 of its Rules and granting the WHDH application (R. 50). Commissioners Case and Craven dissented.

Respondent's Petition for Rehearing, filed under Sec. 405 of the Act (R. 52) was denied on May 20, 1941 (R. 63). On May 21, 1941, Respondent declared its intention to appeal to the Court of Appeals and petitioned the Commission to stay the issuance of any construction permit to Matheson Radio Company, Inc., until the final determination of such appeal. (R. 85, 86.) The Commission denied this request for stay on June 12, 1941 (R. 86-90). Respondent's notice of its appeal to the Court of Appeals was filed April 7, 1941 (R. 1).

SUMMARY OF ARGUMENT.

In this case Respondent challenges both the result reached and the methods employed by the Commission in reaching that result. But principally it challenges the methods employed, for by these methods the result was not only made possible but the formulation of a proper record upon which a different result could have been reached was made impossible.

1.

Respondent alleges and the Commission concedes that KOA will experience interference from the operation of WHDH. It is therefore a person aggrieved and whose interests are adversely affected under Section 402(b)(2) of the Statute. (*FCC* v. *Sanders Brothers Radio Station*, 309 U. S. 642). Petitioner's contention that the *Sanders* case limits the right of appeal to those who suffer financial injury is erroneous.

2.

Respondent twice attempted to become a party to the administrative proceedings upon the WHDH application before the order granting that application was entered. It filed a Petition to Intervene before any evidence was taken upon the application. It filed a second Petition to Intervene after the submission of the Commission's Proposed Findings and Conclusions when it became apparent that the Commission would or might reach a result never contemplated by the proceedings had and the evidence taken. Both Petitions were denied upon the theory that the Commission is required only to hear an applicant and that it has no obligation to hear those who desire to oppose any application.

Respondent had a substantial interest in any action taken upon the WHDH application. The refusal of the Commission to permit Respondent to offer evidence and to test and refute that offered in support of the application involved an erroneous interpretation and application of its own rules (Section 1.102); a misconception of the Commission's power

and authority under the Act; and a violation of the due process clause of the Fifth Amendment to the Constitution of the United States. The Commission's position was not only erroneous; it was such as to make its final Order entirely void.

3.

The Commission was without power to grant the WHDH application without an amendment of Section 3.25 of its Rules. An amendment of that rule to permit the granting of the application involved a substantial change in KOA's frequency assignment within the meaning of Section 303 (f) of the Act. This change, which could legally be made only with Respondent's consent or as a result of a public hearing, was made without hearing and over its repeated protests.

Even if the purported amendment to Section 3.25 had been made lawfully, the Commission was without power to modify KOA's license until Respondent had been afforded a hearing under Section 312(b) of the Act. The KOA license was more than a mere authorization to operate transmitting equipment; until such time as KOA's status was changed by proper legal action, the license authorized service to listeners.

4.

The Order complained of was the result of arbitrary and capricious action. The Commission first designated for hearing an application which under its Rules it had no power to grant. Then it committed a second error when it failed to invoke its own procedural formula (Section 1.71) for the purpose of curing the defects of substance in that application. All proceedings were therefore based upon a defective application and in violation of the Commission's Rules. Moreover, all proceedings were inappropriate to the result reached. After instituting a proceeding having a dual purpose (the possible amendment of its Rules and action upon the application in view of such amendment) it

abandoned all legislative issues and proceeded to conduct a hearing on strictly judicial issues. After such a hearing, it then proposed to and did decide the matter upon the issues originally specified and subsequently abandoned.

5.

Section 409(a) of the Act prohibits the delegation to examiners of hearings involving "a change of policy" by the Commission. The policy fixed by Rule 3.25 was that only one station would be permitted to operate on this frequency during nighttime in order that it might render the greatest possible secondary service. Here after assigning the case to an examiner who conducted the hearing upon issues involving no question of policy change, the Commission changed its policy and granted the WHDH application on the basis of the record made before the examiner. This makes all action taken on this record void.

6.

The Commission's Order ignores the Commission's duty imposed by Section 307 (b) of the Act to make and maintain a fair, efficient and equitable distribution of radio facilities. The order further ignores the adverse effect upon listeners in the United States of a reclassification of KOA's channel under the North American Regional Broadcasting Agreement. Both Section 307(b) and the Treaty are declaratory of the public interest. Without considering them, the Commission could not make the requisite statutory finding that public interest would be served by a grant of the WHDH application. Its refusal to consider them or to permit Respondent to offer evidence with respect to them was arbitrary and capricious.

7.

In denying Respondent's Petition for Rehearing the Commission reaffirmed every error previously made. All questions relied on here were presented in that petition and the Commission was urged to afford appellant administrative

relief. The denial of this petition was not merely erroneous. It was the last in a series of events which made the order appealed from entirely void as a denial of due process.

ARGUMENT.

A. Respondent Has Standing to Maintain Its Appeal.

Although in its Statement of Questions Presented Petitioner makes no reference to Respondent's standing to appeal, it nevertheless devotes a section of its brief to this question. (Petitioner's Brief, pp. 47-55.) The Commission suggests that Respondent is without an appealable interest because it has neither suffered nor alleged a sufficient injury from interference, and for the further reason that this Court's decision in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, limits the right of appeal under Section 402(b)(2) of the Act to those persons who are financially injured.

At the outset, it should be noted, Petitioner does not argue that Respondent has mistaken its remedy and might have had a cause of action in some other court apart from Sec. 402(b) (2). In fact, Petitioner could hardly make such an argument in view of *Black River Valley Broadcasts* v. *McNinch*, 101 Fed. (2d) 235, 69 App. D. C. 311, Cert. denied 307 U. S. 623, 59 S. Ct. 793. Necessarily, therefore, it is the position of the Government that on questions of electrical interference there can be no judicial review of Commission decisions.

On the question of the sufficiency of the allegations of aggrievement, Mr. Justice Rutledge, speaking for the court below, said: (R. 188)

> "On its face, therefore, the notice charges that the order substantially modified the 'license of KOA, changed the class and character of its frequency, degraded the station's service under the North American Agreement; jeopardized thereby not only appellant's rights but the priority rights of the United States and therefore the interests, present and future, of the lis-

tening public, and created discrimination against rural and in favor of urban listeners contrary to statutory requirements. These reasons appear to be a sufficient showing of both private and public interest and of adverse affectation to sustain the appeal. They require that it be considered on the merits, that is, on the question whether appellant was wrongfully refused a hearing before the Commission."

The claim of insufficient allegations of injury from interference under the circumstances disclosed in this record is tantamount to a contention that in an appellate pleading one must restate *in toto* or substantially the contents of all pleadings acted upon below when error with respect to such action is assigned and relied upon. In this case, Respondent alleged injury from interference in its first Petition to Intervene (R. 13), in its Second Petition to Intervene (R. 46), and in its Petition for Rehearing (R. 52). The ruling on each of these pleadings was adverse and the ruling on each was assigned as error in the court below. Moreover, that Respondent's notice of appeal, when construed in its entirety, speaks clearly in terms of electrical interference and the injury resulting to the public and to Respondent from such interference is made clear by the language of Mr. Justice Rutledge just quoted.

As to the sufficiency and serious consequences of the interference itself, which is the gravamen of Respondent's interest in these proceedings, petitioner suggests that it was "slight" and, parenthetically, raises the novel proposition that Respondent's rights therefore should be commensurate. Extended discussion of this point should not be necessary for indeed the Commission's various statements made in these proceedings themselves make it exceedingly clear that Respondent's aggrievement is serious and substantial.

Most, if not all, of the doubt and controversy about the proper meaning of Section 402(b)(2) prior to the *Sanders* case arose where the injury claimed was financial rather than electrical. If the Commission did not then concede the

appellate standing of those claiming injury from electrical interference, it did in effect; it argued that injury from electrical interference was the most that was within the contemplation of Congress in enacting this section, and that it could not properly be extended to include those claiming injury from economic interference. (See decision in this case below, R. 186.) The *Sanders* case was taken to the Supreme Court by the Government largely to resolve the question of the appellate standing of one who claimed financial injury, and the opinion of the Supreme Court in that case must be interpreted in the light of the questions urged upon it.

But aside from considerations of case history, the opinion itself lends no support to the contention now made. What the court decided was that one claiming economic injury from Commission action did have standing to appeal to this court under Section 402 (b) (2); it did not decide that others did not. If any distinction can be made from the opinion of this court in the *Sanders* case, we submit that it runs in favor of rather than against one who claims injury resulting from electrical interference.

When this court had the *Sanders* case before it, it was in effect considering the unusual rather than the usual or customary basis for appeal. The court pointed out that:

> "The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency *in disregard of its prior use by others, thus creating confusion and interference*, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment, the result would have been an impairment of the effective use of these facilities by anyone. The fundamental *purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.*" (Italics supplied)

And again in failing to find any underlying business or competitive protection within the framework of the Communications Act but rather a cogent regard for the prevention of electrical interference, this court said:

> "In short, the broadcasting field is open to anyone, *provided there be an available frequency over which he can broadcast without interference to others,* * * *".

Further, this court said:

> "Plainly, it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, *to permit a licensee who was not interfering electrically with other broadcasters* to survive or succumb according to his ability to make his programs attractive to the public." (Italics supplied.)

Can we conclude from these expressions that this court meant to hold that competition and financial injury were the exclusive bases for this legislation or were the only grounds on which one could claim adverse affectation or legal injury? Obviously, we can not. Respondent's position is concrete, goes to the very essence and heart of Federal regulation of broadcasting and is the very type of aggrievement which Congress considered as fundamental when it wrote Section 402(b)(2) allowing persons adversely affected to take an appeal. Respondent's notice of appeal asserted that by the action complained of it would suffer serious and substantial electrical interference resulting in a curtailment of its broadcasting service area. There can be no question but that the lower court rightly found that respondent had the necessary standing to appeal.

But even if there were doubt as to the meaning of the *Sanders* case it could scarcely persist after *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4. Although in that case this court was limited in its review to a question certified by the court below as to its jurisdiction to issue a stay, the appeal was taken by a licensee claiming electrical interfer-

ence as does Respondent here. This court, on a certificate, ruled that the court below had the requisite jurisdiction to issue a stay. This court would certainly not have authorized the issuance of a stay order in that proceeding if it had entertained any doubt of the court's jurisdiction to hear the appeal in the first instance.

B. Respondent Was Improperly Excluded from the Administrative Proceedings.

While before the Commission this proceeding passed through several disjointed stages. We believe that the validity of certain broad claims made by our adversaries concerning Respondent's lack of right to participate in the administrative proceedings can best be examined by reviewing these several stages and the situation of Respondent with respect to each.

Broadly speaking, the proceedings before the Commission can be divided into three stages or phases. During the first stage of the proceedings—from September 2, 1939, the date of the issuance of the first Notice of Hearing, until December 2, 1939, the date of the issuance of the second Notice of Hearing—the Commission considered the WHDH application upon both a legislative and judicial basis. During the second stage of the proceedings—from December 2, 1939, the date of the issuance of the second Notice of Hearing, until December 9, 1940, the date of the issuance of the Commission's Proposed Findings and Conclusions—the the Commission purported to be considering the application solely upon judicial issues. During the third stage of the proceedings—from December 9, 1940, the date of the Proposed Findings, until April 7, 1941, the date of its Final Order granting the WHDH application, the Commission was considering the application upon both legislative and judicial issues as shown by the final action taken.

The First Stage of the Administrative Proceedings.

Laying aside all questions concerning Respondent's right to be heard upon any proposal involving a substantial change in its operating assignment under Section 303 (f) of the Act, Respondent was a party in interest and entitled to be heard in the first stage of the administrative proceedings for two reasons.

In the first place, Respondent, as the licensee of a dominant clear-channel station on the frequency involved, had a status to defend to the end that it might continue to render the maximum of interference-free service. This status was fixed by the Act, by rules and regulations promulgated by the Commission under the Act, and by the terms of its license granted by the Commission pursuant to both. In other words, as a licensee under the Act, Respondent had rights or privileges which were statutory in character (*Yankee Network* v. *Federal Communications Commission*; 71 Appeals D. C. 11, 107 F. (2nd) 212; *Tennessee Electric Power Company* v. *Tennessee Valley Authority*, 306 U. S. 118, 137). The first Notice of Hearing raised questions concerning a change in the status of Respondent and its station which, if made, would be accomplished by an amendment of Sections 3.22 and 3.25 of the Commission's Rules. Moreover, the questions thus presented were to be considered and determined upon the validity of the proposal made by the applicant, Matheson, in an individual license proceeding. The legislative issues presented were necessarily and inextricably related to issues which were judicial in nature and which could not properly be tried in Respondent's enforced absence.

In the second place, Respondent was entitled to participate in this proceeding for the purpose of testing the validity of the applicant's proposal if, as a legislative matter, the Commission decided that its Rule 3.25 was to be amended. In this event, Respondent was entitled, not to have its service area throughout the United States protected, as at present, from interference arising from

WHDH, but, to have KOA's service protected under the Rule as modified. The location of this contour and the respective rights and obligations of the two stations, therefore, depended upon the weight and character of the testimony submitted. Here again, rights were dependent upon facts which were to be interpreted in the light of the statutory standard; a judicial question was presented in which Respondent as the party whose rights were in jeopardy was entitled to be heard.

The Second Stage of the Administrative Proceedings.

Throughout the second stage of the administrative proceedings, Respondent was a party in interest for the second of the two reasons stated as existing at the first stage. By its Notice of Hearing dated December 2, 1939 the Commission had eliminated all legislative issues but Respondent was still a proper party in interest to the end that it might defend its position and status under the Commission's existing rules.

Due to the Commission's refusal to allow intervention, Respondent's participation at this stage was necessarily limited to taking such action as was required under the Commission's Rules to preserve an exception to that Order. Respondent was precluded from and therefore did not participate in the taking of the evidence before the examiner; likewise it was precluded from filing Proposed Findings and taking other procedural steps which were open to parties at this stage. Moreover, none of the Commission's contentions heretofore dealt with has any direct bearing upon events at this stage of the proceeding.[3]

[3] During the taking of the evidence before the examiner, at this stage of the proceeding, counsel for the applicant explained its theory of the case as follows (R. as certified pp. 383-387):

"Mr. Pierson: Mr. Examiner, I propose to make it clear before we start, we are not suggesting an amendment, or a change or a modification of the Rule; we are not attacking the Rule."

"* * * It is our view that all the rules of the Commission are general propositions designed and promulgated to meet

The Third Stage of the Administrative Proceedings.

The third stage of the administrative proceedings was commenced on December 9, 1940. On this date the Commission issued Proposed Findings in which it was indicated that the case would be decided upon issues not dealt with in the taking of evidence and which, contrary to all action taken during the second stage, involved both legislative and judicial issues. Respondent then, and before the Final Order of the Commission entered April 7, 1941, was a party in interest, for both of the reasons stated as existing at the first stage. It, therefore, on December 20, 1940, filed its second Petition to Intervene. On January 7, 1941, the Commission entered its Order denying this second Petition to Intervene. (R. 50)

Whether the Commission's action of December 9, 1940 be considered as a continuation of the original proceeding, as the record apparently makes clear (R. 54) or the commencement of a new proceeding as was suggested below by the intervener Matheson, is, for present purposes, unimportant. The Decision and Order finally entered was based upon is-

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general problems and general situations and when the facts of a general situation do not exist in a particular case, the Commission has the legal power and the legal duty to avoid the literal application and interpretation of the rule, especially when such literal application would be a means of avoiding service to the public interest."

"We maintain that only in that manner can the reasonableness and the legality of any rule be sustained and have any sanction of law.

"The applicant is of the firm conviction and intends to show that this case constitutes an exception to the general situation that Sections 322 and 325 were designed to meet.

"I wish to reiterate, we do not propose, or even to pretend to say that Sections 322 and 325 are not adequately meeting the general situation but that rule, properly interpreted and applied to this unique and peculiar situation that is the subject of this proceeding does not preclude the operation of WHDH as proposed.

"We propose to examine the general situation, as the examiner has so kindly given us a lead on it, and then proceed to prove that this case does constitute an exception."

sues which affected Respondent and its interests, upon which Respondent had not been heard and concerning which no one, including the applicant, had had notice prior to December 9, 1940. In either event and under either hypothesis, Respondent was entitled to become a party at this stage of the proceedings.

In addition to the errors already committed, the Commission was about to take action specifically prohibited by the statute in two material respects, was about to render a Decision and Order which would make a mockery of any pretense at orderly procedure and was about to render a Decision and Order which would adversely affect Respondent. The Commission's Rules on Intervention (Section 1.102) do not limit such action to any particular stage of the proceeding and even if intervention at this stage was not required, Respondent by its action in filing its second Petition at least put the Commission on notice of its claims before final action was taken and as soon as it was advised of the character of the action proposed.

It affords no answer to say, as the Commission does (R., p. 69) that this petition was "a premature petition for Rehearing". The Commission itself was responsible for the changes in the issues and the fact that it proposed to deal with the application upon a basis wholly different from that which had been contemplated at the time the record was made. The most that can be said against Respondent's action in filing this petition was that it was unnecessary; not that it operated to the prejudice of rights which Respondent had under the statute and which Respondent exercised when on April 25, 1941 it filed its Petition for Rehearing.

Over and above its unlawful conduct in refusing to permit respondent's intervention in the first stages of this proceeding, the Commission acted illegally, arbitrarily and capriciously when it failed to admit Respondent as a party at the third and decisive stage of the administrative proceedings. Then, if not earlier, Respondent was entitled to participate in the determination of those issues which af-

fected it both directly and as a source of service to the public. The refusal to admit Respondent as a party at any stage of the proceedings amounted to an assertion of power which under the Constitution is denied to all administrative agencies whose orders "impinge upon legal rights" (*Norwegian Nitrogen Products Company* v. *United States*, 288 U. S. 294, 318); it amounted to a denial of due process.

The majority opinion of the court below declares that Respondent's rights matured on December 9, 1940 when the Commission issued its "Proposed Findings of Fact and Conclusions" in which it proposed the amendment of Section 3.25 of the Commission's Rules and Regulations and the granting of the WHDH application. Mr. Justice Rutledge held that this was the first action of the Commission detrimental to Respondent's interests and that, therefore, the Petition to Intervene filed seven days later on December 16, 1940 should have been granted.

While we do not veer from our general position that Respondent's rights accrued in the initial stages of the administrative proceedings, we do agree that the greatest threat to Respondent's position occurred upon the issuance of the aforesaid Proposed Findings, and if there can be such a thing as degree of unconstitutionality, the Commission's action in denying Respondent's request to intervene at that stage was the most unlawful of all its actions in this case.

THE REQUIREMENTS OF THE COMMISSION RULE

The Commission's contention that respondent's first Petition to Intervene did not comply with the Commission's intervention rule (Section 1.102) turns on the meaning and effect of that part of the first sentence of the rule which requires that a proposed intervener must allege, in addition to other items specified therein, "the facts on which petitioner bases his claim that his intervention will be in the public interest." Its validity and effect must be tested not entirely as an abstraction but in the light of the situation of the parties and the facts which were admittedly within the Commission's knowledge.

These facts included, among others, (1) the fact that for a period of more than twelve years KOA had occupied an assignment which under the Commission's rules, was free from co-channel interference; (2) the fact that the assignment of WHDH for nighttime operation on this channel would be contrary to those rules which fixed the status of the channel and which were then in force and effect; (3) the fact that the nighttime operation of WHDH upon this channel with the power proposed would result in interference to KOA and to the service being rendered by it; and (4) the fact that when the Commission issued the notice of hearing to which the first Petition to Intervene was addressed, the Commission, on its own motion, brought into issue the question of the adverse effect by reason of interference on KOA.[4] The only uncertainty was within the control of the Commission, namely, the basis upon which WHDH would be permitted to operate during nighttime upon this channel, if at all.

Against this factual background, all well within the knowledge of this Commission, Respondent filed its Petition to Intervene asserting (1) that it operated Station KOA at Denver, Colorado, on 830 kilocycles with power of 50 kilowatts, unlimited time; (2) that the operation of Station WHDH as proposed in its application would cause interference to KOA in areas where the signal was then interference-free; (3) that Respondent would be aggrieved and its interests adversely affected should the WHDH application be granted; and (4) that the operation of WHDH as proposed would not be in the public interest, convenience and necessity.

Aside from the question of the Commission's broad assertion of power with respect to this rule, we submit that Respondent's petition complied with any reasonable and legal interpretation of the language of the rule. We believed

[4] At page 40 of its Brief, the Commission over-simplifies the problem by stating that the application of its Standards of Good Engineering Practice to the known facts gave data upon which the Commission exercised its judgment.

then and we believe now that any petition which contains the allegations made shows that the Respondent's intervention would be "in the public interest." This conclusion necessarily follows if by that term is meant compliance with orderly procedure, with due process of law and the statutory scheme of the Act as construed by the decisions of this court. But if the rule requires more, and the Commission contends that it does, what does it require and by what authority does the Commission impose such requirement?

We submit that it is impossible from the rule itself to determine what the Commission means from the phrase "in the public interest." Mr. Justice Rutledge said in the court below: "The language of the new requirement is ambiguous." We submit further that nothing which has been said about it by the Commission in the record or in its brief clarifies its meaning. The Commission goes to great length to recite in its brief its previous experience under a different rule where "substantial interest" was the test for intervention; it also makes the pious pronouncement that the present standard of intervention "was not adopted, as Respondent has suggested, for the convenience of the Commission but rather because the Commission's experience showed that the rights of applicants for new stations and the interest of the public in the maximum utilization of radio facilities were jeopardized by a procedure permitting unlimited intervention." (Petitioner's Brief, pages 21-22.)

However, the key Commission decision interpreting this rule rendered on the same day as, and used as a basis for denial of the KOA petition, makes no such disclaimer, and states unequivocally:

> "The underlying purpose of the present rule is to limit participation in proceedings, particularly on broadcast applications, to those persons whose participation will be of assistance to the Commission in carrying out its statutory functions." (*In re Application of Hazlewood, Inc.*, Docket 5698, R. 14-20.)

As to this construction, the court below quite properly said:

> "A rule which posits the basic right of hearing exclusively upon mere convenience to the Commission or whether the petitioner's participation 'will be of assistance to it in determining the issues,' leaving this to be determined solely in its discretion, is not reasonable. It is a denial of any right to hearing. That it may be inconvenient or time-consuming for such a body to hear persons substantially interested and affected, or that, in the Commission's exclusive discretion, they may not be able to aid it, furnishes no basis for refusal to hear their side of the case, whether on the facts or the law. Efficiency is not to be bought at such a price to essential fairness. * * *" (R. 198)

We concede that there may be cases where the interests of the proposed intervener are remote or not equally within the knowledge of the Commission where the Commission can properly require elaborate factual allegations to advise it of the nature and degree of its interests. But this is not such a case. Neither in the Order denying the Petition (R. 13) nor in the Commission's Order affirming the denial upon review (R. 24) nor at any other point has the Commission denied Respondent's interest in the WHDH application or the sufficiency of its allegations. The Commission itself was not only fully cognizant of Respondent's interest but in the court below flatly stated in its brief that "the Commission's decision denying appellant the right to intervene was not based upon appellant's lack of interest." Since adverse interest is a sufficient test to determine who may appeal under Section 402(b)(2) of the Act, it is unthinkable that the Commission may impose more stringent requirements upon persons who come before it in the earlier stages of proceedings prior to appellate review. If the Commission is correct in its interpretation of its own powers under this rule which it has created, it may in its discretion, conduct all of its hearings on an *ex parte* basis, and those claiming aggrievement are relegated to the absurd position of having no

rights before the administrative body although they are the exclusive agents through whom an appeal to the courts may be taken.

THE REQUIREMENTS OF THE STATUTE.

As this court has pointed out on several occasions, the primary purpose of the Communications Act is to minimize interference between stations to the end that maximum service to the public may be achieved. Because there are more applicants for the use of radio frequencies than can be accommodated consistent with this purpose, the Commission is given the power of selection between applicants under the standard of public interest, convenience and necessity.

In this case there were conflicting interests between WHDH and KOA to be decided under the statutory standard. Did the Act contemplate that both or either would be given a hearing before the Commission made its selection?

The Commission asserts that only WHDH was entitled to a hearing. It bases this conclusion, in part at least, upon Sec. 309(a) whereby, it says, "Congress sought to promote the full use of radio facilities in the public interest by having them assigned as promptly as possible, while at the same time affording to *applicants* the maximum protection against unwarranted denials of license" and "no right of hearing is conferred upon any person other than an applicant." (Petitioner's Brief pp. 18, 19.)

This argument proves too much. Section 309(a) does not cover all applicants. It covers only applicants for *license* or *renewal of license* or *modification of license*. Its careful language must be read in conjunction with Section 319(a) which expressly forbids the issuance of any *license* unless a construction permit has first been granted by the Commission after a finding that public interest, convenience and necessity will be served thereby. Not until after he has been granted a construction permit and has completed the construction of his station in accordance therewith does a person become eligible to file such an application as those

specified in Section 309(a). At that point, he becomes not only eligible to apply for a license but entitled to receive one.

Had it been the Congressional purpose, as asserted at page 18 of Petitioner's Brief, to afford *applicants* the maximum protection against unwarranted denials of their applications to operate radio equipment, clearly Congress would not have neglected the applicant for construction permit. That such was not the Congressional purpose is established by the particularity by which the section is limited to those applicants who, like this Respondent, have previously acquired a statutory status and statutory rights. Thus properly construed, Section 309(a) is not in conflict with Sections 303(f) and 312(b) but in support of them.

Respondent does not deny that Matheson Radio Company, was, in fact, an applicant for modification of license and therefore entitled to a hearing under Section 309(a). Respondent does deny that Sec. 309(a) either in terms or under any reasonable construction sustains the Commission's position that KOA was not entitled to a hearing. On the contrary, we submit that Respondent was entitled to a hearing in this case under two specific provisions of the Statute, Secs. 303(f) and 312(b); that these sections are consistent with Sec. 402(e) and that all three sustain Respondent's interpretation of Sec. 309(a).

Section 303 (f)

This section of the Act deals specifically with the power of the Commission to make regulations. It prohibits regulations which make "changes in the frequencies, authorized power, or in the times of operation of any station" without the consent of the licensee unless "after a public hearing" the Commission shall determine that public interest will be served thereby. In this case, the Commission could not have granted the WHDH application without amending its Rule 3.25 by changing KOA's frequency from one channel classification to another.

Under the Commission's interpretation (Petitioner's Brief, p. 29), KOA would have been entitled to a hearing under Sec. 303(f) had it been changed from one exclusive channel to another even though no curtailment of service and no injury to KOA resulted from the change. In fact, by coincidence, just such a change was made in KOA's frequency assignment immediately prior to the Commission's final action of April 7, 1941, in order that the adjustments necessitated by the North American Regional Broadcasting Agreement could be made. No injury to KOA resulted, it sought no hearing and it took no appeal. The incident does serve to illustrate, however, the anomalous results which follow acceptance of the Commission's interpretation of this section.

The version of Section 303(f) for which the Commission contends is wholly at variance with the statutory scheme of the Act as construed by this Court. It is not possible to enforce the standards established by the Congress "upon hearing and evidence" or to consider the rights and equities of appellant "in relation to the total situation of which they are a part" and at the same time give to Section 303(f) the meaning for which the Commission contends (*Schechter Corporation* v. *United States*, 295 U. S. 495; *Yankee Network Company* v. *Federal Communications Commission*, 71 Appeals D. C. 11, 16, 107 Fed. (2d) 212, 217).

Nothing in the Act supports the belief that Congress intended to give a hearing to persons who are not injured while denying a hearing to those who are. KOA was injured by Commission action changing its frequency from I-A to I-B and was therefore entitled to hearing under Section 303(f) even under a literal interpretation of the Section. When this and other related provisions of the Act are considered in the light of the purposes of the Act in its entirety, there can be no doubt that Congress intended to and did prohibit the type of action taken here (*Federal Trade Commission* v. *Raladam Company*, 283 U. S. 643, 650; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 605), and the court below so found.

Section 312(b)

Section 312(b) of the Act requires the Commission to grant a licensee a hearing before his license is revoked or modified. This section deals with the power of the Commission not with respect to the making of regulations, but in the exercise of its quasi-judicial function in selecting among applicants. In this case, it has relation not to the Commission's action in amending Rule 3.25 but to its action granting the WHDH application after the Rule was modified.

The Commission defends its refusal of any hearing under Section 312(b) by saying that its order granting the WHDH application did not require KOA to make any change in the operation of its transmitter; and that since the KOA license merely authorizes the operation of a described transmitter during the hours and in the manner specified, Respondent does not qualify as one whose license has been modified under Section 312(b) (Petitioner's Brief, pp. 29-33).

This construction of Section 312(b) denies to a licensee any rights beyond his transmitting antenna. It means that though a licensee may be authorized to broadcast, he is not authorized to broadcast to anybody. And since the transmission of interference-free signals by the broadcaster is the correlative of the reception of interference-free signals by the public, it necessarily ascribes to Congress a purpose utterly foreign to every other provision of the Act and every decision rendered under it.

Nor can the Commission qualify its interpretation of Section 312(b) by asserting that in this case, the resulting interference is "slight". If KOA has no rights to be heard before another station is authorized to cause interference to its service, then the Commission is not restricted to the action it took at Boston. It may, and on January 20, 1942 it did, authorize a station at Cleveland to operate on 850 kilocycles without hearing (*In re WJW, Inc.*, ———

FCC ——— Decided January 20, 1942, not yet reported.) If the Commission has such power at all, it has the power utterly to destroy KOA's service without ever granting Respondent a hearing.

We submit, and at least two members of the Court below found, that the Commission's action of April 7, 1941 constituted a modification of KOA's license within the terms of Section 312(b) of that Act.[5]

Section 402(e)

Although this section of the Act does not purport, independently of Secs. 303(f) and 312(b) to confer any right to hearing upon Respondent, it clearly supports the view that a hearing should have been granted. It provides:

> "At the earliest convenient time *the court shall hear and determine the appeal upon the record before it*, and shall have power, *upon such record*, to enter a judgment affirming or reversing the decision of the Commission, * * * *PROVIDED, HOWEVER, That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive* unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to

[5] Petitioner's Brief at p. 37, seems to suggest that (a) this concept of a license would be permissible only if the Commission had adopted regulations establishing areas or zones to be served under Sec. 303(h); and (b) in that event Respondent would be worse off since Sec. 303(h) does not specifically provide for hearing while Sec. 303(f) does.

There are two answers to such a contention. On the one hand, Respondent is entitled to hearing under Sec. 312(b) before its license is modified whether that modification be accomplished by a change on the face of the license or by a change in the Regulations incorporated by reference in the license and this irrespective of the section of the Act from which the authority for the regulations is derived. On the other hand, both Sec. 303(f) and 303(h) are subject to the paramount requirement that regulations under them shall be "not inconsistent with law"—i. e., consistent with due process.

review by the Supreme Court of the United States upon writ of certiorari on petition therefor under Section 240 of the Judicial Code as amended, by appellant, by the Commission, or by any interested party intervening in the appeal."

Where a statute contains such provisions, it is doubly important that parties affected should be afforded an adequate hearing. This court has clearly so held in *Morgan* v. *United States*, 298 U. S. 468, and *Morgan* v. *United States*, 304 U. S. 1.

Even the limited right of judicial review prescribed by this statute is not open until one has exhausted his administrative remedies and exhaustion of remedies presupposes the existence of such remedies. (See *Red River Broadcasting Company* v. *Federal Communications Commission*, 69 Appeals D. C. 1, 98 Fed. (2d) 282, Cert. Denied 305 U. S. 625.)

THE REQUIREMENTS OF DUE PROCESS.

The question of right to be heard presented in this case goes to the very heart of the administrative process. If, as the Commission contends, proceedings before it are to be patterned solely along lines dictated by its own convenience with no regard for interests or legal rights, then indeed the power of administrative bodies is absolute. But such a theory presupposes in the Commission non-existent powers and also requires an interpretation of the statute which is both unwarranted and in violation of the due process clause of the Fifth Amendment of the Constitution.

The power to make regulations which has been conferred by Congress upon executive or administrative officers from the very outset of our government is not for the purpose of governing their departments but for the purpose of administering the laws which do govern (*United States* v. *Grimaud*, 220 U. S. 506, 517). Such regulations become binding rules of conduct only as subordinate rules and when found to be within the framework of the policy which the Congress has sufficiently defined (*Panama Refining Com-*

pany v. *Ryan*, 293 U. S. 388, 429). Moreover, all enactments of a legislative character, whether by Congress or by executive or administrative officers, are subject to the implied limitation of consistency with due process (*Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123; *United States* v. *Katz*, 271 U. S. 354, 357).

Both in the case of *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Company*, 289 U. S. 266, and the case of *Schechter Corporation* v. *United States*, 295 U. S. 495, this Court interpreted the Commission's power to grant licenses as a limited power. In the *Nelson Brothers* case, this Court said:

> "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond; *whether its proceedings satisfy the pertinent demands of due process*, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial review."

In the *Schecter* case, the court dealt not only with the required factual basis for Commission action, but with procedural requirements as well. Discussing the Federal Communications Commission this Court said:

> "These standards established by Congress were to be enforced upon hearing and evidence, by an administrative body acting under statutory restrictions adapted to the particular activity."

And more recently in *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, this Court said:

> "to be sure, the laws under which these (administrative) agencies operate prescribe the fundamentals of fair play, they require that interested parties be afforded an opportunity for hearing."

In the case of *Yankee Network Company* v. *Federal Communications Commission*, 71 App. D. C. 11, 16, 107 Fed. (2) 212, 217, the United States Court of Appeals for the District of Columbia pointed out that the rights of a licensee are created under the Act by the granting of a license pursuant to the Act, and that such rights are therefore statutory in character and beyond the Commission's power to control; that such rights are neither created nor limited by the Commission's rules governing intervention or other matters of procedure; and that the use of such procedural devices as a petition for intervention is not for the purpose of creating rights but only for the purpose of protecting existing rights. The Court further stated that:

> "equities and rights do not exist in a vacuum but in relation to the total situation of which they are a part."

This is only another way of stating that in any given case the Commission must not only consider the rights, duties and obligations of the applicant and the result to him of any action taken, but must also consider the rights, duties and obligations of existing licensees under the Act and the result to them of any action taken.

And the same court in the case of *Red River Broadcasting Company* v. *Federal Communications Commission*, 69 App. D. C. 1, 98 Fed. (2d) 282, dealt at length with the procedural scheme of the Act and the assertion of rights and the use of remedies by licensees under the Act. It was there stated to be the intention of Congress in formulating the Act to require persons who felt themselves aggrieved by action of the Commission to acquaint the Commission with the nature of their claims and attempt to assert their rights before the Commission prior to the time that anticipated action was taken. It was pointed out that vigilance and the exercise of reasonable care upon the part of such persons was not only necessary for proper administrative action, but for proper judicial review of such action. The very section of the Act upon which the Commis-

sion principally relies (Section 4 (j)) was construed as permitting, if not requiring, interested persons to appear before the Commission and be heard concerning any subject in which they later claim or assert an appealable interest.

In this case, the Commission was required to find as a condition precedent to the granting of the WHDH application that such action would comply with the statutory standard. A finding of this character involves more than the exercise of executive discretion or an ordinary executive determination. Such a finding involves a determination of a judicial nature where rights are dependent upon facts and where those facts must be interpreted in the light of statutory provisions. A determination of this character can validly be made only where parties substantially affected thereby are afforded an opportunity for hearing with all that that term implies (*Morgan v. United States*, 298 U. S. 468, 480, 481; *Morgan* v. *United States*, 304 U. S. 1, 19-20). It is no answer to say, as the Commission does, that it was more convenient for the Commission to proceed otherwise. Nor does it afford an answer to say that the Commission itself is the best judge of when a party should be permitted to intervene in proceedings before it to the end that such proceedings will be promptly concluded. The requirement that hearings precede orders that "impinge upon legal rights" has its origin in constitutional requirements of due process. There can be no compromise with this requirement on grounds of expediency or a desire to be rid of harrassing delay (*Norwegian Nitrogen Company* v. *United States*, 288 U. S. 294; *Ohio Bell Telephone Company* v. *Commission*, 301 U. S. 292, 304).

The Commission has construed Sec. 309(a) of the Act wholly without regard to these fundamental requirements. It deduces from the failure of 309(a) to make specific reference to parties other than applicants an intention on the part of Congress to disregard them. Congress could not validly have done so, even if it had so intended. That it did not intend so to do is amply demonstrated not only by the

Act in its entirety but by the construction which this and other courts have placed upon the Act. Section 309(a) like every other legislative enactment must be constructed in the light of the requirements of due process. Independent of all other errors, the Commission's failure so to construe and apply Sec. 309(a) vitiates the action taken in this case.

C. The Commission Erred in Denying Respondent's Petition for Rehearing.

On April 25, 1941, after the Commission had adopted its final Order, Respondent, acting under the provisions of Section 405 of the Act (48 Stat. 1095; U. S. C. title 47, Sec. 405) filed a Petition for Rehearing in which administrative relief was sought from the errors which had been committed. All errors relied upon in this Court were brought to the attention of the Commission in this petition save one which had not then occurred—the denial of the Petition for Rehearing itself. This occurred on May 20, 1941. (R. 85)

In its petition, Respondent requested that the Commission reconsider its action of April 7, 1941, amending its Rules and granting the applicattion of WHDH and that it then do one of two things. Either that it enter its order denying the WHDH application upon the basis of the proceedings already had, or that it conduct such further proceedings upon that application as would be consistent with law and with its own rules and regulations. Whatever may have been Respondent's right to have the WHDH application denied on the basis of the proceedings already had (and we concede that the granting of this relief was a matter resting in the discretion of the Commission), we submit that the second alternative, namely, that the Commission take such further action upon the application as is consistent with law and with its own procedural requirements represented the minimum to which Respondent was then and is now entitled.

When Congress enacted Section 405 of the Act, it provided a method for curing errors in administrative proceedings without recourse to the courts. To this end, it made the opportunity for administrative relief under Section 405 at least coextensive with that for judicial relief under Section 402 of the Act.[6]

In denying this petition, the Commission submitted a voluminous opinion which appears in the record (R. 63-85). For present purposes that opinion can be summarized as an assertion that the Commission either had considered or was not required to consider all points made in the petition. The Commission dismissed Respondent's plea for a hearing with the statement that "Section 309(a) of the Act requires the Commission to grant applications without hearing, if upon examination thereof it shall determine that the public interest, convenience or necessity will be served by the granting thereof" and the further statement that "no duty rests upon the Commission to afford any person *other than the applicant* an opportunity to be heard". It further asserted that the application upon which the proceedings before the Commission had been had was not defective; that the Commission had not determined matters of policy as a result of the hearing held before the Examiner contrary to Section 409(a) of the Act; and explained to its own satisfaction other deficiencies in the record upon which the action was taken. Having reached the conclusion that the Respondent was not entitled to be heard and the applicant having expressed no dissatisfaction with the result reached, the Commission found no difficulty in explaining the action taken and in disposing of Respondent's contentions.

All that has been said concerning the action of the Commission in denying Respondent's Petitions for Interven-

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[6] *Red River Broadcasting Company* v. *Federal Communications Commission*, 69 Appeals D. C. 1, 98 Fed. (2d) 282.

tion applies with even greater force to the ruling on the Petition for Rehearing. The same errors which were committed in these earlier rulings were repeated and reemphasized here; moreover, this action was taken in the face of a statutory provision which seems to have anticipated the situation in which Respondent found itself when the Commission made its order final without Respondent's participation. But notwithstanding the fact that the Commission was construing and applying a statutory enactment and one which had been construed as making provision for "complete relief for one in the position of the appellant" (*Red River Broadcasting Company* v. *Federal Communications Commission*, *Supra*), we find the Commission applying the same considerations which governed it in construing and applying its own rules to exclude Respondent from the administrative proceedings. These considerations have already been shown to be both contrary to the statutory scheme and violative of due process in their earlier application. They are more clearly so here.

Conceding that the Commission's action upon a petition for rehearing is governed by the exercise of its discretion, that discretion must be a sound and legal discretion and one which must be exercised in the light of the allegations made. The task of curing administrative errors is not a wholly unilateral one, but one in which the Commission as well as parties appearing before it must engage. In this case, the action of the Commission in denying Respondent's Petition for Rehearing was not only an abuse of discretion which amounts to reversible error—it was more than that. It was the last in a series of events which made the order granting the WHDH application entirely void as a denial of due process.

D. The Commission's Action Was Arbitrary, Capricious and Illegal.

Apart from the errors committed and already discussed, the Commission's action is void for other reasons.

1. *The Commission Unlawfully Ignored Its Rules 1.71 and 1.72.*

When the WHDH application was first received at the Commission on October 25, 1938, it was defective in substance and could not have been granted under Sec. 116 (now Secs. 3.22 and 3.25) of the Commission's Rules. (*Crosley Corporation* v. *Federal Communications Commission*, 70 App. D. C. 312, 106 Fed. (2d) 833; *Pittsburgh Radio Supply House* v. *Federal Communications Commission*, 69 App. D. C. 22, 98 Fed. (2d) 303). Notwithstanding this and the further fact that the Rules of the Commission then made no provision for such action, the Commission on January 3, 1939, designated the application for hearing, without at that time issuing a Notice of Hearing.

On August 1, 1939, the Commission's present Rules 1.71 and 1.72 became effective replacing similar rules theretofore in effect (R. 20, 21). Rule 1.71 provides that the Commission will not consider, but will return to the applicant without action, any application not filed in accordance with its Rules. Rule 1.72 requires that a formal Petition be filed if the applicant desires a modification of any rule or regulation (App. 48). The WHDH application thus was not only defective in substance and subject to rejection by the Commission under Rule 1.72 (because in conflict with Secs. 3.22 and 3.25) but it also became defective under the terms of Sec. 1.71. This followed from the fact that the applicant at no time had filed any petition requesting an amendment of Secs. 3.22 and 3.25 as required by Sec. 1.71. Notwithstanding these facts, the Commission on September 2, 1939, issued a Notice of Hearing and indicated that it intended to proceed upon the application by specifying October 10, 1939, as the date for hearing thereon. Con-

fronted with this situation, Respondent on September 29, 1939, filed a motion to dismiss the application and requested the Commission to invoke the requirements of its own Rules (Sec. 1.72) by returning the application to the applicant (R. 20).

On December 2, 1939, the Commission issued its second Notice of Hearing to replace that issued on September 2. As has been heretofore pointed out, in this second notice the issue concerning modification of Secs. 3.22 and 3.25 of the Commission's Rules was eliminated and the only issue pertaining to these Rules was one to determine whether or not "when properly construed and applied" they precluded the granting of the WHDH application. On September 5, 1939, following the issuance of the second Notice, Respondent's motion was dismissed (R. 26) and the Commission finally determined to proceed on the basis of the WHDH application as originally filed.

The reasons for this action are unexplained in the record but only two explanations are possible. The first is that the Commission having on October 10, 1939, decided that Respondent was not entitled to participate in the proceedings upon the WHDH application also decided that it had no standing to present a motion to dismiss the application. The second is that while the Commission hesitated to violate two of its procedural rules, it had no such reluctance at the violation of one. In other words, having determined in its second notice of hearing to eliminate any issue concerning the modification of its rules, the Commission felt free to proceed with the application notwithstanding the requirements of Sec. 1.72 and notwithstanding the further fact that under Secs. 3.22 and 3.25 it had no power to grant the application. But whatever the reasons for this action were, the entire course of the proceedings was altered. As the result of its election to proceed in a manner inconsistent with its own procedural requirements with an application which could not have been granted under its substantive rules, the Commission adopted a course of action which not only made possible but in fact invited the ultimate error.

Events at the hearing show that not only the examiner who heard the case but counsel for all parties who were permitted to participate believed and proceeded upon the theory that the case was to be presented and decided upon the basis of Secs. 3.22 and 3.25 as they then stood; that no question of the modification of these rules was or could be presented. Counsel for the applicant expressly disavowed any intention of requesting a modification of the Commission's Rules. (R. as cert. 183-186) The examiner limited the evidence to the issue specified by the Commission and in so doing, stated that no question of policy or modification of the Commission's Rules was open for consideration or decision. (R. as cert. 183) As a result of this the record made was clearly inappropriate for the determination of any question concerning the modification of the Commission's Rules and even more clearly inappropriate for any action upon the application in the event that the Rules were modified.

When the matter came before the Commission for consideration, three of its five members present and participating elected not to be bound by the issues which the full Commission had specified. What the majority attempted to do was to reach what they considered to be the desired result. Finding both the rules and the proceedings had under those Rules to be inconsistent with this result, they proposed to amend the Rules to conform to that result and disregarded the proceedings had. The action taken amounted to an amendment of the Commission's Rules to conform to the WHDH application followed by a grant of that application with a hearing. This we submit the Commission had no power to do and demonstrates a complete lack of regard for the requirements of quasi-judicial procedure.

We are not unmindful of the fact that in the absence of statutory provisions to the contrary and under proper issues an administrative tribunal may combine in a single proceeding an exercise of quasi-legislative and quasi-judicial functions and promulgate an order having a dual aspect

such as is contemplated by Sec. 1.71 of the Commission's Rules (*Arizona Grocery Co.* v. *Atchison Railway*, 284 U. S. 370). But what the Commission attempted to do here is vastly different. By strange and unprecedented admixture of the judicial and legislative it has attempted to base its order upon a proposal and upon issues concerning which none, including the applicant, had any notice and upon a record which affords no factual basis for the action taken. Having attempted by its first notice to institute a proceeding having a dual aspect, it then altered its procedure to limit the issues solely to ones judicial in nature. After the building of a record on this single issue, the Commission, then undertook to make its decision not upon that issue but upon issues which had been discarded.

We cannot better characterize or describe the action of the majority of the Commission than have Commissioners Case and Craven who dissented from such action and in dissenting said (R. 51):

> "This application was filed and prosecuted in violation of a rule of this Commission promulgated after a general hearing in which the whole industry, including this applicant, was represented. Other licensees of this Commission who applied were denied the right to intervene in the hearing of this particular case. No petition was filed by this applicant to waive or modify the rule for this particular application. In the final order the Commission, on its own motion and without notice to the industry and disregarding its determination of the general policy as promulgated in the rules adopted, has taken the unprecedented action so far as this Commission is concerned of changing a rule in this particular case to allow the granting of this application which was theretofore in violation of the rule.
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> "This invites other applicants to file applications in violation of and without regard to the rules of this Commission. It discriminates against those who have relied upon the rules of the Commission and not filed applications for frequencies which they might desire, and which the rules of the Commission did not permit them to have. This discrimination is inequitable and not in accordance with the best administrative or judicial practices."

2. The Commission Unlawfully Ignored Section 409(a) of the Act.

Moreover, the Commission's action in this case was a clear violation of Section 409(a) of the Act. Section 409(a) confers upon the Commission the power to hold hearings, issue and sign subpoenas, administer oaths, examine witnesses and receive evidence at any place in the United States designated by the Commission (App. p. 49). It further provides that this may be done by any member of the Commission, an Examiner of the Commission, or any Director of any Division when duly designated by the Commission for such purpose "except that in the administration of Title III an Examiner may not be authorized to exercise such powers with respect to a matter involving (1) a change in policy by the Commission, * * * or (4) a new kind of use of frequencies."

Since the reallocation of 1928, the KOA frequency had been classed as one upon which no nighttime operation except KOA's would be permitted. This classification had been established first by the Federal Radio Commission, and had been retained through subsequent allocation orders. The reasons which prompted the establishment and maintenance of this status for this frequency are dealt with extensively in the opinion of the minority of the Commission (R. 42-45), and need not be restated here. These decisions and the considerations which prompted them were clearly ones of policy which determined the use to be made of these frequencies, and they were reflected in Rules and Regulations of the Commission which have the force and effect of law (*Pittsburgh Radio Supply House* v. *Federal Communications Commission*, 69 App. D. C. 22, 98 F. (2d) 303, *Crosley Corporation* v. *Federal Communications Commission*, 70 App. D. C. 312, 106 F. (2d) 833.

Nor can there be doubt concerning the scope of the prohibitions contained in Section 409 (a) of the Act. They clearly restrict the activities of examiners, and the right of the Commission to delegate certain activities to examiners,

in all cases involving broadcasting where considerations of basic policy are involved. They not only prevent examiners from attempting to formulate Commission policies in such cases, but they also prevent examiners from formulating a record upon which such policies are ultimately to be determined. This much is clear from a reading of the Act and the legislative history of this section makes the reasons for these prohibitions apparent.

Section 409 of the Act had its origin in the provisions of H. R. 7716 which passed both Houses of the Seventy-second Congress but failed to become law for lack of Presidential approval. Throughout all proceedings upon this measure before the Senate and the Senate Committee on Interstate Commerce dissatisfaction was shown with the manner in which the Federal Radio Commission was then handling broadcast cases. This dissatisfaction arose out of the practice of that Commission of delegating to examiners the conduct of cases and the making of recommendations where matters of policy were involved. There resulted first an amendment which would have prohibited examiners from hearing any cases, and later a relaxation of that prohibition to restrict the activities of examiners substantially as at present.[7] In its final report to the Senate on this measure

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[7] As H. R. 7716 passed the House, it permitted the Commission to delegate hearings in all matters to examiners or other members (See Report of Hearings Before Senate Committee on Interstate Commerce, 72nd Congress, First Session, Part I, p. 2). As amended, and recommitted to the Committee on December 8, 1932, with a report (Senate Report No. 1104, 72nd Congress, 2nd Session, p. 2), the bill permitted the hearing of cases only by "any member or members of the Commission when duly designated by the Commission for such purpose". As subsequently amended, and passed by the Senate, it provided "that the Commission may authorize examiners to hold hearings and exercise all of the powers herein granted the Commission in connection with holding hearings in cases not involving a change in policy by the Commission, a transfer of the use of radio facilities from one zone to another, a change of regulations, new devices or developments in radio, or a new kind of use of frequencies" (Senate Report No. 1945, 72nd Congress, 2nd Session, p. 2). This language was agreed to in the Conference Report (House Report No. 2106, 72nd Congress, 2nd Session).

(Senate Report No. 1945, 72nd Congress, Second Session, p. 9) the Committee explained the draft finally agreed upon by stating "your Committee believes it more desirable that the Commission should hold all important hearings and secure more personal knowledge of contests by this method, and for that reason has provided that all hearings on major radio questions shall be held by the Commission, or by a Commissioner, or a number of Commissioners, as the Commission may designate."

An amendment to the Commission's allocation rules clearly comes within both the letter and the spirit of the prohibition contained in Section 409 (a). This case is an eloquent illustration of the fact that the apprehensions felt by members of Congress were justified.[8]

See Also Senate Report 781 to accompany S. 3285, 73d Congress, 2nd Session.

"Section 409 Relates to proceedings before the Commission. The Section is largely based upon Sections 12, 17(1), 18, 19 and 20(10) of the Interstate Commerce Act. Examiners and Directors, as well as members of the Commission, are authorized to conduct hearings, administer oaths, and issue subpoenas, but the provisions of H. R. 7716 referred to above, are adopted in part, restricting an examiner from hearing certain cases involving policy, the revocation of a station license, or new developments in radio."

[8] In the hearings before the Senate Committee on this measure after its resubmission to the Committee on December 8, 1932 (Report of Hearings Before Senate Committee on Interstate Commerce, 72nd Congress, First Session, Part II, pp. 58-59) Senator Dill stated his position and that of the Committee as follows:

"*Senator Dill.* I do think that the record shows that the Commission has not been doing the work that the law intended it should do, namely, that it has not been going into these important cases itself except to sit down and read the record, which, I think is a failure to do its duty; and my purpose in proposing to strike out the examiners is to try to have this Commission become an investigating body and the body that will know all about radio, instead of delegating its duties in that regard to inexperienced lawyers who come before it and start the work and gradually become informed on the questions involved and became in effect, the Commission. It is a policy that was never contemplated when this law was written:

Moreover, it is significant here that in the initial stages of this case the Commission itself appears to have construed Section 409 (a) as prohibiting an examiner from conducting a hearing where the outcome might be the amendment of a regulation which governed the use of a frequency. When as a result of its first Notice of Hearing dated September 2, 1939, the Commission specified as one of the issues a possible modification of Sections 3.22 and 3.25 of its Rules, Commissioner Case was designated to hold the hearing. In the second Notice of Hearing dated December 2, 1939, when the Commission removed any issue concerning modification of its Regulations, it then relieved Commissioner Case of this assignment and assigned the matter to an examiner for hearing. These changes in issues and hearing officials were not accidental. They were planned and the plans then made clearly did not contemplate such a result as that finally reached. This is shown by the record of the proceedings before the Examiner, by the dissenting opinion of Commissioners Case and Craven and by the whole course of procedural events.

The plain truth of the matter is that until December 9, 1940, (the date of the issuance of the Proposed Findings and Conclusions) the Commission intended to conduct its proceedings in a manner consistent with Section 409 (a) of the Act. On that day, three of the five members of the Commission who were present and participating, either purposely or inadvertently ignored the requirements of this section. Notwithstanding the fact that this error was brought to the Commission's attention in the Petition to

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and I want to get it before Congress to see whether Congress desires to continue that sort of thing. If so, then I am in favor of abolishing most of the Commission. That is my view of it. * * * Every man who ever sits in a hearing knows the difference in the information he gets about the case being heard when he sits there and participates and is actually in it, as compared with when he sits down and reads the cold record when all the personalities and the surroundings of a hearing are removed."

Intervene filed by respondent on December 16, 1940 (R. 46) and again in Respondent's Petition for Rehearing filed April 25, 1941 (R. 52), the Commission made its proposal of December 9, 1940, final and re-affirmed this action. This is a plain violation of Section 409 (a) which renders entirely void all action taken by the Commission on the record made before Examiner Hyde. The Commission was without power under the statute to amend its Rules as a result of a hearing before an examiner and without such an amendment it was without power to grant the WHDH application.

(3) *The Commission Unlawfully Ignored Section 307(b) of the Act and the North American Agreement.*

Before it may grant any instrument authorizing the construction or operation of a station under the Statute, the Commission must find that public interest, convenience or necessity will be served thereby. It was not until the Commission denied Respondent's Petition for Rehearing (R. 63) that it discussed either Section 307(b) of the Act or the North American Regional Broadcasting Agreement.

Then it said it had found that the improvement and extension of service in the Boston area in and of itself would serve public interest (R. 85). Elsewhere in its decision on the Rehearing Petition, the Commission asserts that Respondent was not entitled to a hearing on the North American Agreement because "This contention is based upon (Respondent's) misconception that it is in some manner subrogated to the rights of the United States under the Treaty".

Obviously, neither Section 307(b) nor the North American Agreement confers upon Respondent any right to hearing. But, being entitled to a hearing under other sections of the Act, and being entitled on appeal to raise any relevant question of law in respect of the Order of the Commission, Respondent may show that in granting the WHDH application, the Commission disregarded the public interest both nationally and internationally.

Section 307(b) of the Act requires the Commission to make and maintain a "fair, efficient and equitable distribution" of radio facilities. As between KOA and WHDH in this case, the section requires comparative showings of the service available and the service to be rendered both in the area gained by WHDH and the area lost to KOA. The Commission made no findings of this sort and the record is barren of any evidence bearing upon the subject.

Under the North American Regional Broadcasting Agreement, the Commission undoubtedly has wide discretion. But its discretion must be exercised within the statutory standard and the Commission must weigh the result of its action on the WHDH application upon the interests of listeners in the United States.

The Commission was required to consider, and Respondent was entitled under the Statute and under the Fifth Amendment to be heard, on both subjects. The Commission's refusal to do the one and to allow the other is reversible error.

E. The Commission's Assertion that Respondent Has Had Sufficient Relief.

The Commission has advanced the novel proposition that since, in its view, Respondent's interest was "slight" only a a modicum of participation was required to satisfy the terms of the statute and the requirements of due process. It suggests that since Respondent filed a brief and presented argument *amicus curiae* and was *permitted* to file a petition for rehearing, it cannot complain. Moreover, it is urged that had Respondent taken advantage of Rule 1.195 it could have achieved its purposes.

In depriving Respondent of its right to be heard, the Commission on its own motion suggested that Respondent file a brief *amicus curiae*. In anticipation of the sort of contention made here, Respondent participated as *amicus curiae* in this proceeding under definite reservation as to its rights

as a party. The following statement appears on page 1 of the Brief filed by Respondent on January 27, 1941:

> "It would be patently inappropriate, in a Brief filed under such circumstances, to devote space to reassertions of NBC's belief that it has been at all times, both a proper and a necessary party to this proceeding. It does request specifically, however, that its action in appearing *amicus curiae* be not construed as a waiver or abandonment of any of the rights which it may have had to participate fully throughout the hearing upon the application of Matheson Radio Company, Inc."

The suggestion that Respondent could have adequately protected its rights by availing itself of the procedure specified in Rule 1.195 can hardly be taken seriously. Section 1.195 of the Commission's Rules shows on its face that the procedure provided for therein was not intended for one in the position of Respondent; moreover, that such procedure, if employed, would not satisfy the requirements of due process. This rule was designed and intended by the Commission as a protection against political pressure. On or about November 10, 1937, when this Rule was first promulgated, Frank R. McNinch, then chairman of the Commission, issued a public statement concerning this rule, which among other things, said:

> "From various sources, I gather the impression that over a period of years there has grown up, like Topsy, the practice of making suggestions, requests or recommendations to members of the Commission or its staff as to matters pending by those not of record as parties in interest; and also by parties in interest, or their attorneys, after the record in a case has been closed but before action by the Commission. This has been the basis for a part of the criticism as to political or outside influence aimed at the Commission, and I think it should be said in all fairness that, whatever may have been the responsibility of the Commission and staff in this respect, such responsibility also rests in part on any who may have made such suggestions to or requests of any Commissioner or staff member."

"* * * To all who desire that the Commission conduct its affairs in a manner that will best serve the interests of the public and reflect credit upon the Commission and Congress, frank appeal is made for support of the Commission in carrying out the purposes to be effected by the Orders hereinafter referred to."

CONCLUSION.

The decision of the court below reversing the Commission should be affirmed.

Respectfully submitted,

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March 7, 1943.

APPENDIX.

COMMISSION'S RULES AND REGULATIONS.

Section 1.71:

"Applications made on prescribed forms, exceptions.—Each application for an instrument of authorization shall comply with the Commission's Rules and Regulations and shall be made in writing, subscribed and verified as provided in section 1.121, on a form furnished by or in the manner prescribed by the Commission * * *; PROVIDED HOWEVER, that in cases where an applicant desires a modification of a rule or regulation, he shall submit a formal petition setting forth the desired change and the reasons in support thereof. The required forms may be obtained from the Commission or from any of its field offices. (For a list of such offices and related geographical districts, see appendix No. 3)

Section 1.72:

"Defective applications.—(a) Applications which are defective with respect to completeness of answers to required questions, execution, or other matters of a purely formal character will not be received for filing by the Commission unless the Commission shall otherwise direct.

(b) Applications which have been received for filing but which are not in accordance with the Commission's rules, regulations or other requirements will be considered defective. If an applicant by specific request of the Commission is required to file any documents or information not included in the prescribed application form, a failure to comply therewith will constitute a defect in the application. Such defective applications will not be considered by the Commission."

COMMUNICATIONS ACT OF 1934.

Section 405:

"After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall

be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: PROVIDED, HOWEVER, That in the case of a decision, order, or requirement made under title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination, shall be subject to the same provisions as an original order."

Section 409 (a):

"Any member or examiner of the Commission, or the director of any division, when duly designated by the Commission for such purpose, may hold hearings, sign and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Commission; except that in the administration of title III an examiner may not be authorized to exercise such powers with respect to a Matter involving (1) a change of policy by the Commission, (2) the revocation of a station license, (3) new devices or developments in radio, or (4) a new kind of use of frequencies. In all cases heard by an examiner the Commission shall hear oral arguments on request of either party."

NORTH AMERICAN REGIONAL BROADCASTING AGREEMENT.

Par. B, 8(d) of Part II:

"(d) If within the period of this Agreement the country to which a clear channel has been assigned shall have made use of the channel but not in the manner above prescribed or not to the extent required by the provisions of this Agreement, such country shall be considered as having relinquished that portion of the rights which it has not used and at the expiration of this agreement, the other countries party thereto shall have the right, if they see fit, to withdraw the unused privileges from such country and to reassign them to any or all of the other interested countries."

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SUPREME COURT OF THE UNITED STATES.

No. 585.—October Term, 1942.

Federal Communications Commission, Petitioner, *vs.* National Broadcasting Company, Inc., (KOA), et al.	On Writ of Certiorari to the United States Court of Appeals, District of Columbia.

[May 17, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

This case presents important questions of procedure arising under Title III of the Communications Act of 1934.[1]

The respondent is licensed to operate station KOA at Denver, Colorado, on a frequency of 850 kilocycles. Station WHDH, of Boston, Massachusetts, had a license to operate, daytime only, on the same frequency. October 25, 1938, WHDH applied to the Communications Commission for an increase in power and for operation unlimited in time. The Commission set down the application and designated certain issues for hearing, of which the following are pertinent: To determine whether the interests of any other stations may be adversely affected by reason of interference, particularly KOA and other named stations; to determine whether public interest, convenience or necessity would be served by modifying the rules governing standard broadcast stations to authorize the proposed operation of WHDH.

The Commission's rules precluded the operation of a second station at night on KOA's frequency;[2] provided that an application not filed in accordance with its regulations would be deemed defective, would not be considered, and would be returned to the applicant;[3] and also that if an applicant desired to challenge the validity or wisdom of any rule or regulation he must submit a petition setting forth the desired change and the reasons in support thereof.[4]

[1] Act of June 19, 1934, c. 652, 48 Stat. 1064, 1081; 47 U. S. C. Sec. 301 ff.
[2] Secs. 3.22 and 3.25.
[3] Sec. 1.72.
[4] Sec. 1.71.

The respondent petitioned to intervene. Its petition was denied. It then moved to dismiss WHDH's application for failure to conform to the rules and regulations. The motion was denied. Meantime the Commission evidently believing that, in view of the possible alteration of the rules concerning standard broadcast stations, questions of policy might be involved and that, consequently, under Sec. 409(a), the hearing would have to be conducted by a member of the Commission,[5] designated Commissioner Case to conduct the hearing.

No hearing was held under the original notice. A new notice was issued which indicated that the Commission did not then contemplate modification of its substantive rules but intended merely to afford the applicant an opportunity to urge that they be construed in the applicant's favor. Issues specified in the second notice were "to determine whether or not the Commission's Rules Governing Standard Broadcast Stations, particularly Sections 3.22 and 3.25 (Part III) properly interpreted and applied preclude the granting of the application" and to determine the nature, extent, and effect of any interference which would result from a grant of the application, particularly with Station KOA and others named. The inquiry thus limited could be heard before an examiner under Sec. 409(a) and, accordingly, the Commission withdrew the designation of Commissioner Case and assigned an examiner.

A hearing was held January 29 and 30, 1940, but the respondent was not permitted to appear or participate. December 9, 1940, the Commission promulgated proposed findings of fact and conclusions. Two commissioners dissented. All agreed that Secs. 3.22 and 3.25 of the regulations precluded a grant of WHDH's application. Three voted to modify those regulations and to grant the application. Respondent then filed its second petition to intervene, which was denied. The Commission subsequently, on its own motion, permitted respondent to file briefs and present an oral argument *amicus curiae*. April 7, 1941, the Commission adopted a final order amending Sec. 3.25 of the rules and granting the WHDH application, two commissioners dissenting.

Respondent filed a petition for rehearing pursuant to Sec. 405 of the Act.[6] This was denied. Thereupon respondent gave

[5] Sec. 409(a), 47 U. S. C. § 409(a) provides that, in the administration of Tit. III, an examiner may not hold hearings with respect to a matter involving a change of policy by the Commission or a new kind of use of frequencies.

[6] 47 U. S. C. Sec. 405.

notice of appeal to the Court of Appeals of the District of Columbia,[7] which concluded that the Commission's action effected a modification of respondent's license and consequently the statute entitled the respondent to be made a party and to participate in the hearing. The court below therefore reversed the Commission's order and remanded the case for further proceedings.[8]

The respondent contends that it was entitled, as a matter of right, to participate in the hearing before the Commission on the question of the granting of WHDH's application and that its rights in this respect were not satisfied by permitting it to file a brief and present argument. It further insists that the Commission's proceeding was invalid due to the provisions of Sec. 409(a) of the statute, the failure to comply with the rules then in force, and the arbitrary and capricious action taken. Finally, the respondent asserts § 405 entitled it to a rehearing and § 402(b)(2) granted it an appeal.

The petitioner urges the grant of WHDH's application did not amount to a substantial modification of KOA's license or so affect KOA's rights as to require that KOA be permitted to intervene and that, in any event, KOA was not denied any substantial right of participation in the proceeding.

First. We are of opinion that respondent was entitled to be made a party.

Section 312(b) of the Act provides:

"Any station license hereafter granted . . . may be modified by the Commission . . . , if in the judgment of the Commission such action will promote the public interest, convenience, and necessity . . . . *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license . . . shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

The Commission found that there would be interference with KOA's broadcast in the eastern part of the United States if WHDH's application were granted. The Commission's own reports to Congress show that at night a small proportion of the urban population and a much larger proportion of the rural population of the country enjoy only such broadcasting service as is afforded by clear channel stations. KOA, one of the stations

[7] Pursuant to Sec. 402(b)(2); 47 U. S. C. Sec. 402(b)(2).
[8] 132 F. 2d 545.

upon which this service depends, has operated continuously at Denver since 1924 and has used a clear channel upon which only one station is permitted to operate during the night. Under the Commission's regulations (§§ 3.22 and 3.25) KOA had, therefore, little or no channel interference from any station located within the United States. In addition, its signals throughout the United States were free, and entitled to remain free, of channel interference from any station in Canada, Mexico or Cuba, pursuant to the provisions of the North American Regional Broadcasting Agreement.[9] The Commission's order deprives KOA of freedom from interference in its night service over a large area lying east of the Mississippi River. Furthermore, the order opens the way for Canada, Mexico, and Cuba, signatories to the broadcasting agreement, to acquire the right to operate stations which may cause channel interference at night on KOA's frequency within the United States.

The respondent urges that it can be shown that the service of WHDH, while interfering at night with that of KOA, would not be a service equally useful, and that the grant to WHDH adds a new primary service to an area already heavily supplied with such service. In its petitions to intervene, the respondent called attention to the terms of its existing license, asserting that the grant of WHDH's application would cause interference in areas where KOA's signal was interference free; that respondent would be aggrieved and its interests adversely affected by a grant of the application and that the operation proposed by WHDH would not be in the interest of public convenience and necessity; that a grant of the application would result in a modification of respondent's license in violation of § 312(b) and would result in a modification of the Commission's regulations without such a hearing as is required by § 303(f) of the Act. In its petition for rehearing the respondent elaborated and reiterated the reasons embodied in its motions for dismissal of the petition and its petitions to intervene.

The Commission says that the section has no application to this case. It asserts that the proceeding was an application by WHDH for modification of its station license and that, under § 309(a) of the Act, the Commission might have acted on the application without any hearing. So much may be conceded, if nothing more were involved. But the grant of WHDH's ap-

[9] 55 Stat., Part 2, 1005.

plication, in the circumstances, necessarily involved the modification of KOA's outstanding license. This petitioner denies, saying KOA's license granted no more than the privilege of operating its station in a prescribed manner and that the grant of WHDH's application in nowise altered the terms of KOA's license. This contention stems from the circumstance that KOA's license authorizes it to operate a transmitter of 50 kilowatts on the frequency 850 kilocycles at Denver. The petitioner says that the grant of WHDH's application affects none of these terms. But we think this too narrow a view. When KOA's license was granted the Commission's rules §§ 3.21 and 3.25 embodied these provisions:

"A 'clear channel' is one on which the dominant station or stations render service over wide areas and which are cleared of objectionable interference within their primary service areas and over all or a substantial portion of their secondary service areas."

"The frequencies in the following tabulation are designated as clear channels and assigned for use by the classes of stations are given:

(a) To each of the channels below there will be assigned one class I station and there may be assigned one or more class II stations operating limited time or daytime only: . . . The power of the class I stations on these channels shall not be less than 50 kilowatts."

850 kilocycles was one of the frequencies appearing on the schedule forming part of the rule.

These rules were incorporated into the terms of KOA's license which granted it a frequency of 850 kilocycles and a power of 50 kilowatts. To alter the rules so as to deprive KOA of what had been assigned to it, and to grant an application which would create interference on the channel given it, was in fact and in substance to modify KOA's license. This being so, § 312(b) requires that it be made a party to the proceeding. We can accord no other meaning to the language of the proviso which requires that the holder of the license which is to be modified must have notice in writing of the proposed action and the grounds therefor and must be given a reasonable opportunity to show cause why an order of modification should not issue. Certainly one who is to be notified of a hearing and to have the right to show cause is not to be considered a stranger to the proceeding but is, by the very provisions of the statute, to be made a party. The very notices issued by the Commission show that that body knew there

would probably be an interference with KOA's signals if the pending application of WHDH were granted; and that the Commission also realized there was a serious question whether the application could be granted under its existing rules. It is not necessary to discuss at any length the sufficiency of the petitions to intervene if, as we have held, the Act itself provided that, in such an instance as the present, KOA was entitled to be brought in as a party. A licensee cannot show cause unless it is afforded opportunity to participate in the hearing, to offer evidence, and to exercise the other rights of a party.

Much is said to the effect that KOA was not in fact injured, because the Commission permitted it to file a brief *amicus curiae* and to present oral argument. It is beside the point to discuss the Commission's rules as to intervention and the privileges accorded by the Commission to one denied intervention since we are of opinion, as already stated, that, under the terms of the Act, the respondent was entitled to participate in the proceedings.

Second. While the Commission did not urge before the court below, and did not advance as a reason for the grant of certiorari, that respondent was not entitled to appeal to the Court of Appeals, this matter was argued here and, as it raises a question of jurisdiction, we shall consider it.

It would be anomalous if one entitled to be heard before the Commission should be denied the right of appeal from an order made without hearing. We think the Act does not preclude such an appeal. Section 402(b)(2) permits an appeal to the Court of Appeals of the District of Columbia by "any . . . person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing" any application for modification of an existing station license. If, within the intent of the statute, the interests of KOA would be adversely affected, or if KOA would be aggrieved by granting the application of WHDH, then the statute grants KOA a right of appeal.

In *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, we dealt with a similar situation. There the question was whether a rival station, which would suffer economic injury by the grant of a license to another station, had standing to appeal under the terms of the Act. We held that it had. We pointed out that while a station license was not a property right, and while the Commission was not bound to give controlling weight to economic injury to an existing station con-

sequent upon the issuance of a license to another station, yet economic injury gave the existing station standing to present questions of public interest and convenience by appeal from the order of the Commission. Here KOA, while not alleging economic injury, does allege that its license ought not to be modified because such action would cause electrical interference which would be detrimental to the public interest.

In view of the fact that § 312(b) grants KOA the right to become a party to the proceedings, we think it plain that it is a party aggrieved, or a party whose interests will be adversely affected by the grant of WHDH's application, as, indeed the Commission seems to have thought when it first noticed WHDH's application for hearing. We, therefore, hold KOA was entitled to appeal from the Commission's action in excluding it from participation in the proceeding and from the order made by the Commission.

The judgment is affirmed.

Mr. Justice BLACK, Mr. Justice MURPHY and Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

Mr. Justice FRANKFURTER, dissenting.

Unlike courts, which are concerned primarily with the enforcement of private rights although public interests may thereby be implicated, administrative agencies are predominantly concerned with enforcing public rights although private interests may thereby be affected. To no small degree administrative agencies for the enforcement of public rights were established by Congress because more flexible and less traditional procedures were called for than those evolved by the courts. It is therefore essential to the vitality of the administrative process that the procedural powers given to these administrative agencies not be confined within the conventional modes by which business is done in courts.

In my judgment the decision of the Court in this case imposes a hampering restriction upon the functioning of the administrative process. This is the aspect that lends this case importance and leads me to express the reasons for my dissent.

The Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 151 *et seq.*, directs the Federal Communications Commission to

"classify radio stations", "prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class", and "assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate". § 303(a)(b)(e). Accordingly, the Commission has established a plan for allocating the available radio facilities among the stations of the country. Under its Rules there are three classes of standard broadcast channels: "clear channels", on which dominant stations render service over extensive areas and which are cleared of objectionable interference within their primary service areas and over all or a substantial part of their secondary service areas; "regional channels", on which several stations serving smaller areas operate simultaneously with powers not in excess of 5 kilowatts; and "local channels", on which many stations serving local areas operate simultaneously with powers not in excess of 250 watts. § 3.21. Similarly, standard broadcast stations are classified into four groups: "class I stations"—dominant stations operating on clear channels and designed to render primary and secondary service over large areas and at relatively long distances; "class II stations"—operating on clear channels and designed to render service over a primary service area which is limited by and subject to such interference as may be received from class I stations; "class III stations"—operating on regional channels and designed to render service primarily to metropolitan districts and the rural areas contiguous thereto; and "class IV stations"—operating on local channels and designed to render service primarily to cities or towns and the suburban and rural areas contiguous thereto. § 3.22. Section 3.25 divides clear channels into two further groups: I-A channels, to which only one class I station is assigned, with one or more class II stations operating limited time or daytime only, and I-B channels, to which both class I and class II stations may be assigned, with more than one station operating at night.

On October 25, 1938, Station WHDH in Boston, Massachusetts, a class II station licensed to operate during the daytime only on the frequency 830 kilocycles (a class I-A channel) with power of 1 kilowatt, applied to the Commission for modification of its license so that it could operate both night and day on that frequency with increased power of 5 kilowatts. At that time Station KOA in Denver, Colorado, was the dominant class I station on the frequency 830 kilocycles, operating unlimited time

with power of 50 kilowatts. Since the Commission's Rules provided for the assignment of only one station to operate at night on the frequency 830 kilocycles, the WHDH application could not be granted without amendment of § 3.25.

Section 309(a) of the Act specifies the procedure which the Commission must follow in passing upon applications for modification of licenses, such as that of WHDH: "If upon examination of any application for . . . modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize . . . modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe." The Commission, upon its examination of the WHDH application, was unable to find that a grant would serve the public interest, convenience, or necessity. The application was therefore, on September 2, 1939, designated for hearing. Three weeks later, on September 23, 1939, KOA filed a petition to intervene. Its petition, in substance, alleged only that the proposed operation of WHDH would "cause interference to station KOA in areas where KOA's signal is now interference free", that KOA "would be aggrieved and its interests adversely affected" by the proposed operation, and that a grant of the WHDH application would not be in the public interest, convenience, or necessity.

The Court holds that the Commission was required as a matter of law to grant KOA's petition to intervene in the hearing upon the WHDH application. In my judgment the Act precludes such a construction. Section 4(j) provides that the Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"; § 303(r) authorizes it to make "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act". We have held that by force of these provisions "the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be al-

lowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138.

The breadth of discretion entrusted to the Commission is limited, however, by §§ 303(f) and 312(b). The former provides that "changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with". Section 312(b) authorizes the Commission to modify outstanding station licenses "if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

The procedural scheme established by the statute is thus clear: if application is made for a station license, or for modification or renewal of a license, the Commission may grant such application without a hearing if it finds, upon examination of the application, that a grant would be in the public interest. If it is unable to reach such a determination from its study of the application, it must afford the applicant a "hearing". § 309(a). If a Commission order involves a change in the frequency, authorized power, or hours of operation of an existing station without its consent, such licensee is entitled to a "public hearing". § 303(f). If a Commission order involves "modification" of an outstanding license, presumably something other than a change in frequency, power, or hours of operation, the modification order cannot become effective until the licensee is given notice in writing and a "reasonable opportunity to show cause why such an order of modification should not issue". § 312(b). It is relevant

here, also, that under § 312(a) a Commission order revoking a station license cannot take effect "until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation." The Act explicitly provides for a "hearing", therefore, when the Commission proposes to deny an application for a license, or to revoke a license, or to change the frequency, power, or hours of operation of a station licensee. But when a Commission order merely involves "modification" of the license of an existing station, the latter is entitled only to notice in writing and a "reasonable opportunity to show cause" why the order should not issue.

The Commission has exercised the authority given it by Congress to formulate its administrative procedure. Section 1.102 of its Rules, relating to intervention in Commission proceedings by interested parties, provides as follows:

"Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest, and must be subscribed or verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such petition shall not have the effect of changing or enlarging the issues which shall be those specified in the Commission's notice of hearing unless on motion the Commission shall amend the same."

Under an earlier rule any person could intervene in a Commission proceeding if his petition disclosed "a substantial interest in the subject matter". § 105.19, Commission's Rules and Regulations (1935). The reasons for the change in the Commission's intervention rule were thus stated by the Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 186, 76th Cong., 3d Sess., Pt. 3, pp. 16-17: "The effects of this complete freedom of intervention [available under the old rule] upon the Commission's activities were very marked. Not only

was the record unnecessarily prolonged by the discussion of non-controversial issues, but the evidence relevant to each issue was increased manyfold by virtue of the extended cross-examination of witnesses by each intervener. More often than not the interveners presented no affirmative evidence on the issues at hand. The major functions served by them were apparently to impede the progress of the hearing, to increase the size of the record, and to obfuscate the issues by prolonged and confusing cross-examination. Nor were these dilatory and destructive tactics restricted to the hearing itself. Each intervener would customarily avail himself of his rights to take exceptions to the examiner's report, to oral argument before the Commission, and, in many cases, to appeal from the Commission's order to the District of Columbia Court of Appeals. . . . If this [new] provision is enforced intelligently and forcefully, an important step will have been taken both toward the protection of applicants and the increase of the Commission's prestige." Compare *In re Hazelwood, Inc.*, 7 F. C. C. 443.

KOA's petition for intervention was denied, presumably because the showing required by § 1.102 had not been made. And on January 29 and 30, 1940, a hearing upon the WHDH application was held before an examiner of the Commission. Although KOA was denied the right to intervene, it could, under § 1.195 of the Commission's Rules, have appeared and given evidence. That rule provides that the Secretary of the Commission shall maintain "a record of all communications received by the Commission relating to the merits of any application pending before the Commission", and if the application is designated for hearing, the Secretary must notify all persons who have communicated with the Commission regarding the application "in order that such persons will have an opportunity to appear and give evidence at such hearing." Under this rule if KOA had appeared at the hearing upon the WHDH application, it would have been entitled to present evidence relating to the matters raised in its petition for intervention. But, so far as the record before us shows, it made no effort to take advantage of the right of participation afforded it by § 1.195.

On December 9, 1940, the Commission issued proposed findings and conclusions. Under these the Commission found that the proposed operation of WHDH, with use of a directional antenna,

"would not cause any interference to the primary service of Station KOA, Denver, Colorado, and that such interference as the proposed operation of WHDH might reasonably be expected to cause to reception of KOA would be limited to receivers in the eastern half of the United States"; that the operation of WHDH as proposed in its application would "enable it to deliver service of primary signal quality to an area having a population of 3,093,000 or to 621,000 more people than are now included within the primary service area of the station"; that by extending WHDH's hours of operation "a new primary service to 94.9% of the Boston metropolitan area, including a population of 2,185,000", would be provided; that, in addition to the improved service to listeners in the Boston area, there would be "an improvement and extension of service which applicant station [WHDH] now endeavors to render over the fishing banks situated off the New England coast"; and that the public interest would be served by amending § 3.25 of the Rules so as to make the frequency 830 kilocycles a I-B channel, upon which more than one station could operate at night, thereby permitting "more efficient use of the frequency".

On December 16, 1940, KOA again petitioned to intervene. Its petition alleged only that the proposed action, if adopted, would result in "interference to Station KOA in areas where KOA's signals are now interference free", would constitute a modification of KOA's license without affording it an opportunity to be heard, and would result in "a degradation of service on 830 kc which will be prejudicial to the priority rights in the United States on this channel, will discriminate against service to rural listeners in order to furnish additional service to the City of Boston which is already well served". KOA made no offer to contradict or add to the evidence adduced at the hearing, nor did it dispute the Commission's conclusions as to the extent of the interference which KOA would suffer from the proposed operation of WHDH. Accordingly, on January 7, 1941, the Commission denied KOA's second petition to intervene, but it permitted KOA, as well as other "clear channel" stations interested in the proceeding, to participate in the oral argument before the Commission, and to file briefs *amicus*, in order to determine whether the proposed findings should be made final.

Meanwhile, on January 23, 1941, the President proclaimed the North American Regional Broadcasting Agreement, 55 Stat. 1005.

The purpose of this Agreement, which was concluded at Havana on December 13, 1937, among Canada, Cuba, Dominican Republic, Haiti, Mexico, and the United States, was to "revise and establish principles covering the use of the standard broadcast band in the North American Region so that each country may make the most effective use thereof with the minimum technical interference between broadcast stations". The signatory Governments recognized that "until technical developments reach a state permitting the elimination of radio interference of international character, a regional arrangement between them is necessary in order to promote standardization and to minimize interference." The Agreement established priorities in the use of specified clear channels, sixty-three of which were assigned to the United States, and provided that each such channel "shall be used in a manner conforming to the best engineering practice with due regard to the service to be rendered by the dominant stations operating thereon".

In order to carry out the provisions of the Agreement, the United States was obliged to make extensive adjustments in the assignments of its existing stations. As part of the accommodations required, stations assigned to the frequency 830 kilocycles were to be moved to 850 kilocycles. This change affected both WHDH and KOA. The license of KOA, like that of all other standard broadcast stations, would have expired on August 1, 1940, while the WHDH application was pending. The licenses of all stations, including KOA and WHDH, were successively extended by the Commission, first to October 1, 1940, and then to March 29, 1941, the effective date of the Agreement. KOA had filed an application for renewal of its license to operate on 830 kilocycles, 50 kilowatts, unlimited time. On February 4, 1941, the Commission advised all applicants for renewals, including KOA, that under the Agreement, their operating assignments were to be changed and that their applications for renewals would be regarded as applications to operate upon the new frequencies, unless the applicant wished to operate upon some other frequency, in which event its application would be designated for hearing. So far as appears, KOA did not notify the Commission that it had any objection to its renewal application being regarded as an application to operate on the frequency 830 kilocycles. Accordingly, when its license to operate on 830 kilocycles expired on March 29,

1941, its license was renewed on the frequency 850 kilocycles. In no sense, therefore, did the action of the Commission changing KOA's frequency assignment pursuant to the North American Regional Broadcasting Agreement constitute a modification of KOA's license. And, indeed, KOA makes no such contention here. for review of Commission orders modifying station licenses, upon the Commission's own motion, can be reviewed only in a suit brought in a district court under § 402(a). See *Scripps-Howard, Radio Inc.* v. *Federal Communications Comm'n*, 316 U. S. 4, 8-9, note 3.

On March 26, 1941, three days before the Agreement was to become effective, the Commission issued an order adopting the proposed findings and conclusions upon the WHDH application, granting WHDH authority to operate on 850 kilocycles, with power of 5 kilowatts, day and night, and amending § 3.25 of its Rules so as to make the frequency 850 kilocycles a I-B channel upon which more than one station could operate at night. This order was made effective April 7, 1941.

On April 25, 1941, KOA filed a petition for rehearing before the Commission, repeating in substance the allegations contained in its earlier petitions to intervene. And on May 20, 1941, the Commission, in an opinion that considered in detail each of the allegations in the petition for rehearing, denied the petition. The Commission stated that, "in view of the importance of the matters involved in this proceeding, we shall re-examine our findings and conclusions and the record upon which they are based." In summary, it found that a grant of the WHDH application "would not result in interference to the primary service of Station KOA, Denver, Colorado, and that such interference to the reception of Station KOA as might reasonably be expected to result from a grant of the Matheson [WHDH] application would occur in its secondary service area and would be limited to receivers in the eastern half of the United States, remote from the KOA transmitter; that such secondary service as KOA could render in this area would be of uncertain character because of its dependence upon the characteristics of the individual receiver, the signal intensity and the signal to interference ratio involved in each individual case"; and "that although petitioner [KOA] contends it is entitled to serve the rural areas in which it is claimed interference will occur, it fails to allege either that it has been providing a useful service in such areas or point out, in terms of population, the nature and extent of the claimed interference."

On June 7, 1941, KOA filed an appeal from the Commission's order in the Court of Appeals for the District of Columbia under § 402(b)(2) of the Communications Act of 1934. Section 402(b) provides for appeals to the Court from decisions of the Commission "in any of the following cases: (1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission. (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

The court below could not take jurisdiction of the suit unless KOA had a right to appeal under § 402(b)(2), in other words, unless it was "aggrieved" or its "interests were adversely affected" by the granting of the WHDH application. Since the Commission in exercising its licensing function must be governed by the public interest and not the private interest of existing licensees, an appellant under § 402(b)(2) appears only to vindicate the public interest and not his own. *Federal Communications Comm'n* v. *Sanders Radio Station*, 309 U. S. 470; *Scripps-Howard Radio, Inc.* v. *Federal Communications Comm'n*, 316 U. S. 4. That the Commission's order may impair the value of an existing station's license is in itself no ground for invalidating the order; it merely may create standing to attack the validity of the order on other grounds. Whatever doubts may have existed as to whether the ingredients of "case" or "controversy", as defined, for example, in *Muskrat* v. *United States*, 219 U. S. 346, are present in this situation were dispelled by our ruling in the *Sanders* case that the legality of a Commission order can be challenged by one "aggrieved" or "whose interests are adversely affected" thereby, even though the source of his grievance is not what is claimed to make the order unlawful. But from this it must not be concluded that anyone who claims to be "aggrieved" or who is in any way adversely affected by Commission action has a right to appeal. As the prevailing opinion in the Court of Appeals pointed out: "In the present stage of radio, very few changes, either in frequency or in power, can be made without creating some degree of electrical interference. This may range from minute and practically harmless interruption with remote and very occasional listeners in secondary service areas to total obliteration in the primary field. . . . It seems not unreasonable to read

the [*Sanders*] opinion as requiring by implication that there be probable injury of a substantial character. So much by way of limitation seems necessary to prevent vindication of the public interest from turning into mass appeals by the industry at large, with resulting hopeless clogging of the administrative process by judicial review. Likewise, with electrical interference, it is hardly necessary to secure appellate championship by every broadcaster who may be affected in only a remote and insubstantial manner." 132 F. 2d 545, 548.

In order to establish its right to appeal, therefore, KOA had to make a showing that its interests were substantially impaired by a grant of the WHDH application. This, the record makes clear, it failed to do. In its notice of appeal to the court below, KOA made only a general allegation, what courts normally regard as a conclusion of law, that the Commission's action resulted in a "substantial modification" of its license. No supporting allegations of fact were tendered. There was no claim that KOA's economic position was in any way impaired, or that the proposed operation of WHDH would cause substantial interference with KOA, or that such operation would result in a substantial loss of listeners to KOA, or that any areas of substantial size would no longer be able to receive satisfactory service from KOA. Neither in its petitions for intervention, nor in its petition for rehearing before the Commission, nor in its notice of appeal to the court below, did KOA specifically challenge the correctness of the Commission's findings.

The record affords no basis, therefore, for finding that KOA had standing to appeal from the grant of the WHDH application. But even if it had, I do not believe that KOA was afforded less opportunity to participate in the proceedings before the Commission than the statute requires. Assuming that the grant of the WHDH application constituted a "modification" of KOA's license in the sense that the scope of the operations authorized by KOA's license was thereby limited, only § 312(b) would come into operation. Section 303(f) is inapplicable because the grant of the WHDH application unquestionably did not change KOA's frequency, power, or hours of operation. Both before and after the Commission's action, KOA's operating assignment was precisely the same: 850 kilocycles, 50 kilowatts, unlimited time. And so the only question on this phase of the case is —was KOA afforded such opportunity of participation in the

WHDH proceeding as § 312(b) requires? That section provides that no order modifying the license of any existing station "shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

KOA does not claim that it did not have sufficient notice, formal and otherwise, of the proceedings upon the WHDH application. Nor can there be any doubt that it had ample and "reasonable opportunity to show cause" why WHDH's application should not be granted. Under § 1.195 of the Commission's Rules it could have appeared and given evidence at the hearing upon the WHDH application. That it did not take advantage of such an opportunity is certainly no reason for saying that it had none. KOA was permitted to argue before the Commission that the proposed grant of the WHDH application should not be made final. It submitted a petition for rehearing which the Commission considered on its merits and which the Commission denied only after a detailed review of all the contentions made by KOA.

The Court holds, nevertheless, that the Commission was required to afford KOA more than all these opportunities to show cause. Section 312(b) is construed to require a hearing in which the licensee whose interests may be affected is entitled to intervene as a formal party. Such a construction appears to me to disregard the structure and language of the legislative scheme. Congress might have been explicit and provided in § 312(b) that every licensee whose interests may be affected by Commission action shall be entitled to a hearing as an intervenor in the proceeding. As has been noted, the draftsmen of the Communications Act of 1934 knew how to use apt words when they wished to afford parties before the Commission the right of "hearing". Section 309(a) requires the Commission to afford an applicant for a license a "hearing", not notice and an opportunity to show cause, before the application can be denied. Section 312(a) gives a licensee a "hearing", not notice and an opportunity to show cause, before its license can be revoked. Section 303(f) provides that the Commission cannot change the frequency, authorized power, or times of operation of a licensee unless it affords such licensee a "public hearing", not merely notice and an opportunity to show cause. But, for reasons which it deemed sufficient, Con-

gress did not choose to make this technical requirement of a "hearing" in specifying the procedure for the protection of licensees who might be affected by Commission action. Congress may well have desired to avoid the litigious waste so abundantly established by the voluminous cases to which the claim of intervention in courts has given rise. The requirement of notice and an opportunity to show cause is not the equivalent of the requirement of a "hearing". By imposing this requirement for the adequate protection of substantial interests Congress charged the Commission with the duty of devising appropriate procedure which would "best conduce to the proper dispatch of business and to the ends of justice." § 4(j). The Commission's response was §§ 1.102 and 1.195 of its Rules.

Can it seriously be claimed that the Commission acted beyond its authority in providing that before a licensee can intervene in another proceeding he must indicate some solid ground by setting forth "the facts on which the petitioner bases his claim that his intervention will be in the public interest"? Otherwise anyone who asserts generally that the grant of another's application will affect his license may become a party to a proceeding before the Commission and may, to the extent to which a party can shape and distort the direction of a proceeding, gain all the opportunities that a party has to affect a litigation although he has not made even a preliminary showing that his intervention will be in the public interest. I cannot read the requirement for "reasonable opportunity to show cause why such an order of modification should not issue" as a denial to the Commission of power to make such a reasonable rule for sifting the responsibility of potential intervenors. And if the Commission's rule for intervention was within its discretionary authority in formulating appropriate rules of procedure for the conduct of its proceedings, it is equally clear that the Commission, in the circumstances of this particular case, was justified in finding that KOA made no substantial claim that the grant of the WHDH application would impair KOA's economic interests or entail a substantial loss of listeners or make any appreciable inroads upon any areas served by KOA or otherwise substantially affect its interest or that of the public.

To deny to the Commission the right to require a preliminary showing, such as was found wanting here, before admitting a petitioner to the full rights of a party litigant is to fasten upon the

Commission's administrative process the technical requirements evolved by courts for the adjudication of controversies over private interests. See *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142-44. It is to assume that the modes familiar to courts for the protection of substantial interests are the only permissible modes, regardless of the nature of the subject matter and the tribunals charged with administration of the law. This is to read the discretion given to the Federal Communications Commission to fashion a procedure relevant to the interests for the adjustment of which the Commission was established through the distorting spectacles of what has been found appropriate for courts. We must assume that an agency which Congress has trusted is worthy of the trust. And especially when sitting in judgment upon procedure devised by the Commission for the fair protection of both public and private interests, we must view what the Commission has done with a generous and not a jealous eye.

Mr. Justice DOUGLAS dissenting.

While I am in substantial agreement with the views expressed by Mr. Justice FRANKFURTER, there are a few words I desire to add on one phase of the case.

I agree with the Court that if as we held in the *Sanders* case (309 U. S. 470) a person financially injured by the grant of a license has a standing to appeal, so does one whose station will suffer from electrical interference if the license is issued. I expressed my doubts, however, in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 20-21, whether Congress endowed private litigants with the power to vindicate the public interest when it gave the right to appeal under § 402(b) to a person "aggrieved or whose interests are adversely affected" by a decision of the Commission. I also expressed my concern in that case with the constitutionality of a statutory scheme which allowed one who showed no invasion of a private right to call on the courts to review an order of the Commission. See *Muskrat* v. *United States*, 219 U. S. 346. But if we accept as constitutionally valid a system of judicial review invoked by a private person who has no individual substantive right to protect but who has

standing only as a representative of the public interest,[1] then I think we must be exceedingly scrupulous to see to it that his interest in the matter is substantial and immediate. Otherwise we will not only permit the administrative process to be clogged by judicial review; we will most assuredly run afoul of the constitutional requirement of case or controversy. *Federal Radio Commission v. General Electric Co.*, 281 U. S. 464.

Any actual controversy which may now be present in this case is between KOA and the Commission. Any controversy which existed between WHDH and the Commission has come to an end. *United States v. Alaska S. S. Co.*, 253 U. S. 113, 116. The interest, if any, of the appellant KOA is the interest of a private person and accordingly must be measured in terms of private injury. That interest must be substantial and immediate if the standard of the statute and if the constitutional requirements of case or controversy, as interpreted by the *Sanders* and the *Scripps-Howard* cases, are to be satisfied. It is necessary to show in effect that KOA has sustained or is about to sustain some direct and substantial injury (see *Massachusetts v. Mellon*, 262 U. S. 447, 488)—an injury which for the purpose of this case must result from electrical interference. The *Sanders* case and the *Scripps-Howard* case do not dispense with that requirement. They merely hold that an appellant has his case decided in light of the standards of the public interest, not by the criteria which give him a standing to appeal.

I do not understand that the opinion of the Court takes a contrary view. It only holds on this phase of the case that KOA made an adequate showing under § 402(b). I disagree with that conclusion.

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[1] Referred to as a sort of King's proctor by Edgerton, J., in Colorado Radio Corp. v. Federal Communications Commission, 118 F. 2d 24, 28; and as "private Attorney Generals" by Frank, J., in Associated Industries of N. Y. State, Inc. v. Ickes, — F. 2d —.